

FACTUAL HISTORY

On April 8, 2014 appellant, then a 59-year-old retail associate/window clerk, filed a traumatic injury claim (Form CA-1) alleging that on April 7, 2014, Kevin Flynn, customer services manager, lowered his shoulder and barreled into him, knocking him to the concrete floor causing injury to his right knee, left knee and shoulder down left arm, back, and headaches. He stated that he could not get up, and an ambulance was called. Appellant stopped work at that time. On the claim form Mr. Flynn stated that, as appellant walked toward him, he leaned into Mr. Flynn and made soft contact, then walked quickly backward, and sat on the ground. Appellant accused Mr. Flynn, and the police were called. He stated that the claim was being challenged. Mr. Flynn maintained that the claim was fraudulent and an investigation would be conducted.

A Lyndhurst Police Department investigation report dated April 7, 2014 found that Richard Disanza had called 911 because appellant had fallen to the floor and claimed to be injured. The report stated that Mr. Flynn advised that appellant brushed shoulders with him, then threw himself backwards, landed on the floor, and claimed to have been shoved by Mr. Flynn. The report found that appellant alleged that, while walking past Mr. Flynn, Mr. Flynn lowered his shoulder striking appellant's left shoulder, which caused him to stumble backwards and fall to the ground. Appellant stated that he hit the inside of his right knee. He stated that he would decide later whether to file a complaint against Mr. Flynn. Appellant was transported to Clara Maass Medical Center for evaluation.

In an April 7, 2014 statement, Mr. Flynn advised that early on April 7, 2014 he had talked with appellant about deficiencies noted in a "mystery shopper report" from April 3, 2014. He stated that at approximately 3:15 p.m. on April 7, 2014, as he was separating mail for the evening dispatch, appellant started walking toward him, and he leaned inward to give appellant more room, noting that appellant was a much larger person. Mr. Flynn stated that as appellant walked past, he lightly touched Mr. Flynn's left shoulder with his left shoulder, barely making contact. He stated that appellant then became animated and abruptly began walking backwards, and carefully and slowly set himself onto the floor and yelled that Mr. Flynn had shoved him and called for an ambulance. Mr. Flynn asked Mr. Disanza to call 911. Appellant then asked Mr. Disanza to help him up, which he did, and appellant stated that he did not need an ambulance. Upon rising, appellant, who was limping, called a shop steward on his cellular telephone. Mr. Flynn noted that earlier in the day, he had received a call from another shop steward because appellant was unhappy about receiving a work deficiency regarding a mystery shopper visit. He attached documentation dated April 7, 2014 where he had informed appellant of 94 percent mystery shopper score on April 3, 2014, which was unacceptable. Appellant noted that the shopper's closing comment was, "It is unlikely that I would return to this [employing establishment] because I did n[o]t feel that the clerk gave me options before attempting to complete my purchase."

In an April 7, 2014 statement, Mr. Disanza advised that, as he was sitting at his desk, he noticed appellant walking and Mr. Flynn breaking down mail. He stated that, when he turned his head, he saw appellant walking backwards really fast, as if he had lost his balance, and then he landed on the floor. Mr. Disanza related that, because appellant asked for an ambulance, he

called 911, and then appellant stated that he did not want an ambulance. After getting up, appellant was limping, and then the police arrived.

A Clara Maass Medicine Center Emergency Department record dated April 7, 2014 noted a history that appellant was involved in an altercation at work that day and was pushed to the floor, sustaining an injury to the right knee. Dr. Allison Lam, Board-certified in emergency medicine, provided a history that appellant stated that he was hit in the head with a manager's elbow and pushed to the ground. Appellant related that during the assault, he twisted his right knee and injured his low back during the fall, and now complained of right knee and low back pain, and a mild headache. Physical examination demonstrated lumbar paravertebral tenderness, and tenderness to the lateral aspect of the right knee with limited range of motion with flexion, secondary to pain. There was no knee swelling or ecchymosis. Gait was normal. A right knee x-ray demonstrated no evidence of acute bony abnormality. Discharge diagnosis was right knee sprain, and appellant was advised to follow-up with his primary care provider.

A notice, signed by appellant on April 9, 2014, indicated that appellant had filed a civil complaint and trial was scheduled on April 22, 2014.

An April 28, 2014 investigative memorandum from the postal inspection service reported that appellant alleged that Mr. Flynn had bumped into him and knocked him to the floor, but that Mr. Flynn had denied the allegation. On April 9, 2014 two postal inspectors interviewed appellant at the Lyndhurst Police Department where he was making a complaint against Mr. Flynn about the April 7, 2014 incident. Appellant was wearing a brace on his right knee and was represented by a union representative. The report stated that appellant alleged that Mr. Flynn dropped his shoulder and hit him with a hard shot that leveled him, he fell to floor, he did not know if he hit his head, and he could not get up. He was then transported to the hospital *via* ambulance and reported that since the incident, he has back, bilateral knee, and left elbow pain, a twitching eye, and headaches. The report states that the investigators interviewed both Mr. Disanza and Mr. Flynn who disputed appellant's description of the incident.

In statements dated May 6 and 14, 2014 statement, appellant maintained that he was not upset by the mystery shopper score on April 7, 2014. He stated that, throughout that day Mr. Flynn had berated and harassed him, that he had called a union steward about it, and that, after the steward called Mr. Flynn about it, the incident happened. Appellant maintained that part of the mystery shopper grade was for things outside his control such as a dirty lobby and insufficient forms in the lobby. He reiterated that Mr. Flynn knocked him to the floor and discussed events that happened prior to the April 7, 2014 incident. Attached was a retail customer experience shopper evaluation dated April 3, 2014,² and postal policies regarding mystery shopper evaluations.

In a May 7, 2014 statement, Mr. Flynn reiterated that he did not assault appellant. He noted that appellant had reported different versions of the scenario on his Form CA-1, on the police report, and in an assault charge that he filed with the police. Mr. Flynn maintained that appellant was approximately five inches taller and 125 pounds heavier, which made it

² Appellant was not identified in the evaluation.

logistically impossible for appellant to sustain the claimed injuries from sitting on the floor after walking backwards.

In an April 10, 2014 report, Dr. David N. Feldman, a Board-certified orthopedic surgeon, reported a history that appellant was involved in an altercation at work when a man bumped into his left shoulder, dropping him to the floor, and presented for evaluation of left elbow, back, and bilateral knee pain, which occurred suddenly after the work injury. He noted a past history of three knee arthroscopic procedures, that appellant used crutches to ambulate, and walked with an antalgic gait. Dr. Feldman described examination findings and reviewed x-rays of the left knee, lumbar spine, and cervical spine. He diagnosed cervical spondylosis without myelopathy; sprains and strains of the neck; lumbago; sacroiliitis; lumbar sprains and strains; osteoarthritis of the left knee; chondromalacia patella; lower leg effusion, pain, and stiffness; sprains and strains of the elbow and forearm with pain and stiffness; and dislocation knee tear of medial cartilage or meniscus. Dr. Feldman recommended further studies.

An April 12, 2014 magnetic resonance imaging (MRI) scan of the right knee demonstrated full-thickness cartilage loss, prior surgical changes, a partial thickness tearing of the proximal patellar tendon, and an intact lateral meniscus. An April 16, 2014 MRI scan study of the left elbow demonstrated degenerative changes and chronic intrasubstance tearing.

On April 28, 2014 Dr. Feldman noted appellant's complaint of continued left elbow and bilateral knee pain. He reviewed the MRI scan studies, performed physical examination, and reiterated his diagnoses. An April 30, 2014 MRI scan of the left knee demonstrated severe medial tibiofemoral compartment degenerative change, a degenerative tear of the medial meniscus, and a partial thickness intrasubstance tear of the proximal patellar tendon. In a treatment note dated May 15, 2014, Dr. Feldman discussed appellant's MRI scan findings. He reported that appellant, who was assaulted and knocked to the ground, was being treated for partial patellar tendon tear, contusions of the knees, meniscus tears of the left knee, a left elbow sprain, and low back pain. Dr. Feldman advised that appellant was unable to return to work.

In correspondence dated May 16, 2014, Gary Dalton, a union vice president, described meeting with appellant and two postal inspectors at the Lyndhurst Police Department on April 9, 2014. He stated that appellant was on crutches with a brace on his right knee. Mr. Dalton disagreed with the investigation report and Mr. Flynn's assertions. He discussed "mystery shopper" policy and maintained that Mr. Flynn had a history of harassing employees, including appellant. Mr. Dalton concluded by stating that Mr. Disanza's statement fully supported appellant's claim.

On May 19, 2014 Deborah Wagner, Ph.D., a licensed clinical psychologist, stated that appellant was receiving psychotherapy following an incident when he was assaulted at work by his supervisor and was seriously injured. She related that since the incident he suffered from extreme anxiety, depression, suicidal ideation, insomnia, problems with concentration, and more. Dr. Wagner diagnosed post-traumatic stress disorder and opined that his symptoms were a direct result of the April 7, 2014 assault.

By decision dated May 27, 2014, OWCP denied appellant's claim because there were conflicting versions of how the claimed incident occurred. Appellant timely requested a hearing before an OWCP hearing representative.

On June 5, 2014 Dr. Feldman advised that appellant was scheduled for knee surgery on June 10, 2014 and would be out of work until August 15, 2014.

On June 20, 2014 the U.S. District Court, District of New Jersey, dismissed a civil action with prejudice, filed by the State of New Jersey against Mr. Flynn, as the municipal prosecutor would not prosecute, the complaint.

In an undated report, Dr. Deborah Eisen, Board-certified in family medicine, stated that she examined appellant on June 2, 2014. Appellant reported a history that on April 7, 2014 he was assaulted by his supervisor who pushed him, causing him to fall to the floor injuring his left elbow, neck, back, and both knees. Dr. Eisen noted that he had identical findings on knee MRI scan studies of patellar tendon tears, and this could have only have occurred due to the April 7, 2014 incident when, following being pushed or bumped by his supervisor, appellant's upper body moved before his lower portion, causing both patellar tendons to tear.

At the hearing, held on January 7, 2015, appellant testified that on April 7, 2014 he was returning to his workstation as a window clerk and Mr. Flynn was approaching from the opposite direction. He stated that Mr. Flynn dropped his shoulder, barreled into him, banged into him, and hit him below his left shoulder, knocking him backwards, spinning him around, and knocking him to the floor. Appellant stated that he asked for an ambulance, and Mr. Disanza called 911. He related that he was helped up and went in the back and sat on the platform, and that two policemen came and he gave a statement, alleging that Mr. Flynn assaulted him. Appellant was then transported by ambulance to an emergency room. He stated that he had left knee surgery on June 17, 2014 to repair a torn patella tendon. Appellant discussed the mystery shopper assessment and maintained that he was constantly harassed by Mr. Flynn. He stated that he had just returned to work three weeks prior to the hearing. Appellant's representative argued that Mr. Flynn's statement was totally false and that Dr. Eisen's report was totally supportive of appellant's claim.

By decision dated March 23, 2015, an OWCP hearing representative affirmed the May 27, 2014 decision, finding that, as there was no evidence that an assault occurred, appellant did not establish that the incident occurred as reported.

On April 17, 2015 appellant, through his representative, requested reconsideration. He asserted that, whether or not an assault took place, the evidence supported that on April 7, 2014 appellant fell at work and, therefore, appellant established fact of injury. In support, appellant submitted duplicates of Mr. Disanza's statement, and the reports from Dr. Eisen and Dr. Wagner. He also submitted documentation regarding the complaint he filed against Mr. Flynn and its resolution and excerpts of OWCP procedure manual.

In a merit decision dated June 25, 2015, OWCP denied modification of the prior decision.

LEGAL PRECEDENT

An employee seeking compensation under FECA has the burden of establishing the essential elements of his or her claim by the weight of reliable, probative, and substantial evidence,³ including that he or she is an “employee” within the meaning of FECA and that he or she filed his or her claim within the applicable time limitation.⁴ The employee must also establish that he sustained an injury in the performance of duty as alleged and that his disability for work, if any, was causally related to the employment injury.⁵

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established. There are two components involved in establishing fact of injury. 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 medical evidence to establish that the employment incident caused a personal injury.⁶

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.⁷ Moreover, an injury does not have to be confirmed by eyewitnesses. 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.⁸

ANALYSIS

The Board finds that, based on contradictory testimony, the record does not establish that an incident occurred at work on April 7, 2014 as alleged. Mr. Flynn advised that appellant leaned into him, brushed, or bumped into him as he was walking past. In various reports, appellant provided different versions of the incident. On the claim form, he stated that Mr. Flynn lowered his shoulder, barreled into him, and this knocked him to the floor. In personal statements, appellant stated that Mr. Flynn knocked him to the floor. At the hearing, he testified that on April 7, 2014 as he was returning to his work station, Mr. Flynn was walking toward him,

³ *J.P.*, 59 ECAB 178 (2007).

⁴ *R.C.*, 59 ECAB 427 (2008).

⁵ *Id.*; *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁶ *T.H.*, 59 ECAB 388 (2008).

⁷ *R.T.*, Docket No. 08-408 (issued December 16, 2008).

⁸ *Betty J. Smith*, 54 ECAB 174 (2002).

dropped his shoulder, barreled into him, banged into him, and hit him below his left shoulder, knocking him backwards, spinning him around, and knocking him to the floor.

The police reported on April 7, 2014 that appellant stated that, while walking past Mr. Flynn, he lowered his shoulder, striking appellant's left shoulder, and this caused him to stumble backwards and fall to the ground. In the emergency department record on April 7, 2014, Dr. Lam reported a history that appellant was hit in the head with a manager's elbow and was pushed to the ground. In a postal service investigative memorandum dated April 28, 2014, appellant reported that Mr. Flynn dropped his shoulder and hit him with a hard shot that leveled him, and he fell to the floor and could not get up. Dr. Feldman reported a history that appellant was assaulted at work and knocked to the ground. Dr. Wagner reported a history that appellant was assaulted at work by his supervisor and seriously injured. Dr. Eisen reported a history that appellant was assaulted by his supervisor who pushed him, and this caused him to fall to the floor.

The only witness statement is from Mr. Disanza. Mr. Disanza related on April 7, 2014 that, as he was sitting at his desk, he noticed that appellant was walking and that Mr. Flynn was breaking down mail. He stated that when he turned his head, he saw appellant walking backwards really fast, as if he had lost his balance, and then he landed on the floor.

Physical contact by a coworker or supervisor may give rise to a compensable work factor, if the incident occurred as alleged.⁹ Mr. Disanza did not witness any touching, and appellant provided different versions of the event. Because there are significant inconsistencies in his description of the claimed assault and how he fell, they are sufficient to cast serious doubt as to whether the employment incident occurred as alleged. Thus, the Board finds that appellant has not met his burden of proof to establish an employment-related incident on April 7, 2014.¹⁰

As appellant has not established that the alleged April 7, 2014 employment incident occurred, it is not necessary to review the medical evidence of record.¹¹

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 an employment-related injury on April 7, 2014.

⁹ *Denise Y. McCollum*, 53 ECAB 647 (2002).

¹⁰ *See supra* note 8.

¹¹ *See D.R.*, Docket No. 15-1281 (issued September 16, 2015).

ORDER

IT IS HEREBY ORDERED THAT the June 25 and March 23, 2015 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 24, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board