United States Department of Labor
Employees' Compensation Appeals Board

K.D., Appellant	)	
and	)	**Docket No. 15-0919**
	)	**Issued: September 2, 2015**
DEPARTMENT OF VETERANS AFFAIRS, SALISBURY VETERANS ADMINISTRATION MEDICAL CENTER, Salisbury, NC, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 25, 2015 appellant filed a timely appeal from a February 10, 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 injury on September 24, 2014 while in the performance of duty.

FACTUAL HISTORY

On December 23, 2014 appellant, a 60-year-old housekeeping aid, filed a traumatic injury claim (Form CA-1) alleging that he fractured his right foot due to a slip and fall on

[1] 5 U.S.C. § 8101 *et seq.*

September 24, 2014 while performing his employment duties. On the claim form, the employing establishment controverted the claim.

In a December 29, 2014 letter, OWCP notified appellant of the deficiencies of his claim and requested a detailed description as to how the alleged injury occurred. It afforded him 30 days to submit additional evidence and respond to its inquiries.

Appellant submitted a narrative statement dated January 5, 2014 which reported that on September 24, 2014 at 10:00 a.m. he informed his supervisor that he needed to go to the emergency room at the Veterans Administration (VA) Hospital. The VA Hospital let him use sick leave to elevate his right foot and provided medication. That weekend appellant went to the emergency room in Salisbury where they took x-rays, provided medication, and prescribed a boot. On Monday, he went to his primary care physician, Dr. Murphy, who took x-rays, provided antibiotics, and sent him home. Appellant returned to work. Dr. Murphy told him that his x-rays showed "broken toes I had broke[n] in 2009." Appellant decided to seek medical attention when he saw blood in his sock that day.

In a September 25, 2014 report Renae Matthews, a physician assistant, indicated that appellant was seen at the V.A. Medical Center for right foot pain. Ms. Matthews stated that he had fractured his right foot on July 12, 2014. She released him to sedentary work only.

On November 10, 2014 Dr. Alberto Orosco, a podiatric surgeon, diagnosed right foot ulceration. Dr. Orosco stated that appellant's symptoms appeared on October 17, 2014.

In a December 29, 2014 letter, the employing establishment controverted appellant's claim. On December 30, 2014 the employing establishment indicated that appellant had been in a car accident several weeks ago. In an e-mail message dated October 27, 2014, Laura Hodge stated that another supervisor in appellant's service, Bruce Hayes, informed her that appellant had "wrecked his car a couple weeks ago ... flipped it."

By decision dated February 10, 2015, OWCP denied appellant's claim finding that his injury on September 24, 2014 did not arise in "the performance of work-related duties."[2]

LEGAL PRECEDENT

An employee seeking benefits under FECA[3] 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

[2] By decision dated April 29, 2015, OWCP denied appellant's request for an oral hearing or a review of the written record as untimely. The Board and OWCP may not simultaneously exercise jurisdiction over the same issue in the same case. Because OWCP must review its decision in order to exercise its discretion on whether to grant an untimely request for a hearing, it may not issue a decision granting or denying a request for a hearing regarding the issue on appeal before the Board. It lacked authority to issue its April 29, 2015 decision, as the case was at that time before the Board on an appeal of the same decision on which the hearing was requested. Accordingly, OWCP's April 29, 2015 decision is rendered null and void. *See* 20 C.F.R. § 501.2(c)(3); *Arlonia B. Taylor*, 44 ECAB 591, 597 (1993).

[3] 5 U.S.C. § 8101 *et seq.*

States" within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury[4] 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.[5]

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 or she 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.[6]

An 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 an eyewitness 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.[7] An employee has not met his burden of proof to establish 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 statement in determining whether a *prima facie* case has been established. 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]

The employee must also submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.[9]

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[4] OWCP regulations 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. 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).

[5] *See T.H.*, 59 ECAB 388 (2008). *See also Steven S. Saleh*, 55 ECAB 169 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[6] *Id. See Shirley A. Temple*, 48 ECAB 404 (1997); *John J. Carlone*, 41 ECAB 354 (1989).

[7] *See Joseph H. Surgener*, 42 ECAB 541, 547 (1991); *Gene A. McCracken*, Docket No. 93-2227 (issued March 9, 1995).

[8] *See D.B.*, 58 ECAB 529 (2007); *Robert A. Gregory*, 40 ECAB 478 (1989); *Thelma S. Buffington*, 34 ECAB 104 (1982).

[9] *See J.Z.*, 58 ECAB 529 (2007).

ANALYSIS

OWCP denied appellant's claim on the basis that his injury on September 24, 2014 did not arise in the performance of duty. The Board affirms the denial and further finds that the factual evidence does not establish that appellant slipped and fell on September 24, 2014. As noted above, the first element of fact of injury requires that appellant submit evidence establishing that an incident occurred at the time, place, and in the manner alleged.[10]

On his claim form, appellant alleged that he fractured his right foot due to a slip and fall on September 24, 2014. In his January 5, 2014 narrative statement, appellant indicated that he went to the emergency room at the VA Hospital at 10:00 a.m. on September 24, 2014. In accordance with long precedent, the Board finds that there are such inconsistencies in the evidence to cast doubt upon the validity of appellant's claim.[11]

There are unresolved discrepancies regarding the time, place, and manner in which the alleged employment incident occurred. Appellant alleged that he fractured his right foot due to a slip and fall on September 24, 2014, but he failed to identify the location of his fall or describe the manner of his fall.[12] In his January 5, 2014 narrative statement, appellant indicated that his primary care physician, Dr. Murphy, told him that his x-rays showed "broken toes I had broke[n] in 2009." In her September 25, 2014 report, Ms. Matthews stated that appellant had fractured his right foot on July 12, 2014. On November 10, 2014 Dr. Orosco diagnosed right foot ulceration and stated that appellant's symptoms appeared on October 17, 2014. These accounts are contradictory in nature.[13] Appellant's own statements and the statements from Ms. Matthews and Dr. Orosco are inconsistent with the surrounding facts and circumstances.[14] Appellant has not reconciled these contradictions in the record. He did not provide a detailed account of the incident, as required in a traumatic injury claim.[15] Appellant's allegations were vague and did not relate with specificity the circumstances, or the exact and immediate consequences, of the injury.[16] He did not file his traumatic injury claim until December 23, 2014 more than 30 days after the alleged September 24, 2014 incident, which constitutes late notification of injury. He

[10] *See supra* note 6.

[11] *Bennie W. Butler,* 13 ECAB 156 (1961).

[12] *S.H.*, Docket No. 14-1814 (issued March 12, 2015) (where appellant alleged pulmonary injury from exposure to bleach but did not identify her specific location at time of alleged exposure. The Board affirmed OWCP denial of incident).

[13] *L.A.*, 58 ECAB 630 (2007) (where appellant submitted medical reports which did not agree on the date of injury or diagnosis, the Board affirmed OWCP denial of claim because the incident had not been established).

[14] *Cf. S.A.*, Docket No. 10-1786 (issued May 4, 2011) (where the Board found that appellant established that the incident occurred as alleged, as there were no inconsistent statements from appellant or other evidence refuting the occurrence of the alleged incident).

[15] *See V.H.*, Docket No. 12-1621 (issued December 21, 2012).

[16] *Id.*

submitted no witness statements in support of his claim.[17] Appellant has not offered any explanation for these factual deficiencies. As noted above, such defects in the factual evidence are sufficient to cast doubt on whether the employment incident occurred as alleged.[18] Accordingly, the Board finds that appellant has not met his burden of proof to establish that he experienced an employment-related incident at the time, place, and in the manner alleged.

As appellant has failed to establish the first component of fact of injury, it is not necessary to discuss whether he submitted medical evidence sufficient to establish that a medical condition existed and whether the condition was causally related to his federal employment.[19] Thus, the Board finds that appellant has not met his burden of proof to establish an injury in the performance of duty on September 24, 2014, as alleged.

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 has not met his burden of proof to establish that he sustained an injury on September 24, 2014 while in the performance of duty.

[17] *Michael Hall,* Docket No. 98-0153 (issued September 2, 1999) (where appellant submitted no corroborating evidence or statement, where the employing establishment controverted the claim, where the medical evidence failed to describe an incident as alleged by appellant. The Board found appellant had failed to establish an incident occurred).

[18] *See S.M.*, Docket No. 12-946 (issued on January 29, 2013) (where the employee alleged that she fell down stairs at work, the Board found that the factual evidence was not sufficient to establish that the employment incident occurred as alleged on the basis that she provided late notification of injury, did not seek immediate medical attention, and provided no witness statements).

[19] Given that appellant did not establish an employment incident, further consideration of the medical evidence is unnecessary. *See Bonnie A. Contreras*, 57 ECAB 364, 368 n.10 (2006); *Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997).

ORDER

IT IS HEREBY ORDERED THAT the February 10, 2015 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: September 2, 2015
Washington, DC

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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