

**United States Department of Labor
Employees' Compensation Appeals Board**

K.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
New York, NY, Employer**

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**Docket No. 16-0626
Issued: August 15, 2016**

Appearances:
Stephen Larkin, for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 6, 2016 appellant, through his representative, filed a timely appeal of a September 8, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether appellant met his burden of proof to establish an injury in the performance of duty on July 23, 2013.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

On appeal, appellant's representative contends that the evidence of record is sufficient to establish that the injury occurred as alleged and requests that the claim be accepted.

FACTUAL HISTORY

On July 25, 2013 appellant, a 49-year-old mail processing clerk, filed a traumatic injury (Form CA-1), alleging that he sustained a left foot injury on July 23, 2013 as a result of falling down stairs. He stated that there was a slippery surface on the staircase at work and he was walking down the stairs, while holding onto the handrail, when his right foot slipped and caused him to lose balance. In trying to regain his balance, the bottom of appellant's left foot hit the edge of one of the stairs below and then he fell forward. When he got up, he managed to hop to the nearest exit of the building and sit down for a few minutes to avoid putting further pressure on the injured foot. After sitting by the side of the building for several minutes, appellant got up and hopped to a nearby cab and went to the emergency room where he called and notified his manager of the injury. He stopped work on July 24, 2013 and has not returned.

In an emergency room report from Lenox Hill Hospital dated July 23, 2013 and time-stamped at 3:42 p.m., Dr. Christine B. Haines, a Board-certified emergency medicine specialist, diagnosed foot sprain and discharged appellant to home. A physician assistant prescribed crutches until appellant's follow-up examination and released him to work in five days.

On July 26, 2013 A. Curet, appellant's immediate supervisor, stated that appellant did not inform management of his July 23, 2013 injury. In an undated letter another customer service supervisor, Lochard Carriere, indicated that he was the late-end supervisor on July 23, 2013. He stated that he was on the first floor of the 1L Deck at 12:35 p.m. dispatching carriers when appellant left Building 909 by the vehicles' exit. Mr. Carriere asserted that appellant did not report any accident or discuss any such matters with him on that day.

In an August 9, 2013 letter, OWCP advised appellant of the deficiencies in his claim and afforded him 30 days to submit additional evidence and respond to its inquiries.

Subsequently, appellant submitted an August 30, 2013 narrative statement indicating that he notified a union representative, Ivona Palmer, the station manager, Mr. Hamm, and a physician of his injury that same day on July 23, 2013. Appellant asserted that he spoke to the station manager from the hospital emergency room and notified him that the injury had occurred. Then, he called the station on July 24, 2013 to notify the supervisor of the accident. The supervisor informed appellant that she was currently unable to do the necessary paperwork and instructed him to come down to the station on July 25, 2013 for a second supervisor to do the paperwork since his immediate supervisor was off work that day. Appellant went to the station on crutches and waited for the second designated supervisor to do the paperwork. He waited for two hours, but no one filled out the paperwork. Appellant was instructed to return on July 26, 2013 in order to have the paperwork filled out by his immediate supervisor, Mr. Curet. He stated that his injury occurred at 12:35 p.m. on July 23, 2013 while he was on his way out of the building to go home. Appellant alleged that he was in so much pain and in fear of what happened to his foot that his immediate reaction was to get to an emergency room as soon as possible, which is why he notified his manager of the injury after he went to the hospital. He stated that no intervening incidents occurred.

X-rays of the left foot dated July 23 and August 3, 2013 showed no evidence of fracture.

On August 2, 2013 Dr. Jessica B. Gallina, a Board-certified orthopedic surgeon, asserted that appellant sustained a work-related injury and diagnosed foot sprain. She opined that appellant was unable to work. In an August 13, 2013 attending physician's report (Form CA-20), Dr. Gallina reiterated her diagnosis of left foot sprain and asserted that appellant "fell down stairs at work" on July 23, 2013. On August 22, 2013 she stated that he reported walking down the stairs on July 23, 2013 at approximately 12:35 p.m. when his right foot slipped and caused him to lose balance and fall forward. Appellant stated that the bottom of his left foot landed on the edge of a lower stair and he continued to fall forward. Upon physical examination, Dr. Gallina found that he had an antalgic gait, swelling of the foot, and tenderness in the following areas: calcaneus, plantar foot. She diagnosed foot sprain and strain and opined that appellant's condition was causally related to his work accident. On August 29, 2013 Dr. Gallina stated that her medical opinion was based on examination and radiology study. She explained that the "impact of [appellant's] foot hitting the stairs would have caused the injury" and continued to recommend that appellant was totally disabled.

By decision dated September 11, 2013, OWCP denied the claim as appellant failed to submit sufficient factual evidence to support that the injury and/or events occurred as alleged.

On October 2, 2013 appellant, through his representative, requested reconsideration and submitted a September 27, 2013 witness statement from Ms. Palmer who testified that on July 23, 2013 appellant "did inform his manager, Mr. Hamm, that he had an accident." Ms. Palmer stated that appellant called her on her cell phone because no one was answering the telephones on the work floor. As she was speaking to him, she testified that she saw Mr. Hamm and gave him her cellphone so that appellant could speak to him.

In an August 1, 2013 report, Dr. Gallina diagnosed foot sprain and strain related to a work-related left foot injury and ordered a standing x-ray. On August 22, 2013 she opined that appellant was able to return to work on September 7, 2013 with the following restrictions: standing no more than 10 minutes at a time. On September 19, 2013 Dr. Gallina diagnosed left plantar fasciitis and released him to work on October 12, 2013 without restrictions.

By decision dated November 24, 2014, OWCP denied modification of its prior decision.

On May 28, 2015 appellant's representative again requested reconsideration and appellant submitted a narrative statement reiterating the factual history of his claim. Appellant also resubmitted the September 27, 2013 witness statement from his union representative, Ms. Palmer, and submitted a call log dated July 23, 2013.

In an August 14, 2014 report Dr. Deborah Eisen, a Board-certified family practitioner, diagnosed left foot sprain and opined that appellant's condition was causally related to falling down the stairs at work. She explained that "the impact of [appellant's] foot hitting the stairs in an awkward way," "stepping down unevenly on a flight of stairs," and "the act [of] placing one's foot unevenly would cause damage to the area resulting in sprained foot/ankle," which was consistent with the physical examination findings of Dr. Gallina and appellant's diagnosed conditions and symptomatology.

By decision dated September 8, 2015, OWCP denied modification of its prior decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA 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 injury³ 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

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, an 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.⁵

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.⁶

ANALYSIS

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.⁷ An injury does not have to be confirmed by eyewitnesses in order to establish that an employee sustained

³ 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).

⁴ See *T.H.*, 59 ECAB 388 (2008). See also *Steven S. Saleh*, 55 ECAB 169 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁵ *Id.* See *Shirley A. Temple*, 48 ECAB 404 (1997); *John J. Carlone*, 41 ECAB 354 (1989).

⁶ *Id.* See *Gary J. Watling*, 52 ECAB 278 (2001).

⁷ See *Elaine Pendleton*, *supra* note 4.

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.⁸ 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.⁹ 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 doubt on an employee's statements in determining whether a *prima facie* case has been established.¹⁰ 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.¹¹

The Board finds that the evidence of record does not contain inconsistencies sufficient to cast serious doubt on appellant's version of the employment incident. On his claim form, appellant indicated that his injury occurred at 12:35 p.m. on July 23, 2013 while he was leaving the building to go home. Although his supervisor, Mr. Carriere, asserted that appellant did not report any accident that day, his witness statement corroborated the fact that appellant left work at 12:35 p.m. on July 23, 2013. Appellant stated that there was a slippery surface on the staircase at work and he was walking down the stairs, while holding onto the handrail, when his right foot slipped and caused him to lose balance. In trying to regain his balance, the bottom of his left foot hit the edge of one of the stairs below and then he fell forward. Regarding notification of injury, appellant submitted an August 30, 2013 narrative statement indicating that he notified Ms. Palmer, a union representative, Mr. Hamm, the station manager, and the emergency room physician of his injury on July 23, 2013. A September 27, 2013 witness statement from Ms. Palmer corroborated that on July 23, 2013 appellant notified her and "his manager, Mr. Hamm, that he had an accident." She stated that appellant called her on her cellphone because no one was answering the telephones on the work floor. As she was speaking to him, Ms. Palmer testified that she saw Mr. Hamm and gave him her cell phone so that appellant could speak to him. Appellant further sought medical treatment on the same day as the alleged incident. In an emergency report from Lenox Hill Hospital dated July 23, 2013 at 3:43 p.m. Dr. Haines diagnosed foot sprain and he was discharged with crutches. Appellant stated that no intervening incidents occurred between his fall at 12:35 p.m. and his visit to the emergency room at 3:42 p.m. The medical reports of record contain a history of injury consistent with his account of events. Thus, under the circumstances of this case, the Board finds that appellant's allegations have not been refuted by strong or persuasive evidence. The Board, therefore, finds that the evidence of record is sufficient to establish an incident occurred at the time, place, and in the manner alleged by him on July 23, 2013.¹²

⁸ See *Charles B. Ward*, 38 ECAB 667 (1989).

⁹ See *Tia L. Love*, 40 ECAB 586 (1989).

¹⁰ See *Merton J. Sills*, 39 ECAB 572 (1988).

¹¹ See *Constance G. Patterson*, 41 ECAB 206 (1989); *Thelma S. Buffington*, 34 ECAB 104 (1982).

¹² See *Leonard T. Munson*, Docket No. 98-1478 (issued December 23, 1999).

As OWCP has not yet reviewed the medical evidence, the Board therefore will set aside the September 8, 2015 merit decision and remand the case for consideration of the medical evidence.

On remand, OWCP should review the medical evidence as to whether appellant's left foot conditions are causally related to the accepted July 23, 2013 work incident. After such further development as it deems necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision on the issue of causal relationship.

ORDER

IT IS HEREBY ORDERED THAT the September 8, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 15, 2016
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