

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

D.S., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS HEALTH ADMINISTRATION,
Waco, TX, Employer**

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**Docket No. 15-1298
Issued: October 11, 2016**

Appearances:
Appellant, pro se
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 May 21, 2015 appellant filed a timely appeal from an April 15, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 October 24, 2012.

FACTUAL HISTORY

On October 29, 2012 appellant, then a 52-year-old housekeeping aid supervisor, filed a traumatic injury claim (Form CA-1) alleging that on October 24, 2012, while receiving keys, he

¹ 5 U.S.C. § 8101 *et seq.*

had pain radiating from his left leg and abdomen. He stated that a knot started rising in the left side of his stomach. Appellant massaged the knot and it resided in the lower left side of his stomach. He indicated that he had left leg pain, left foot pain and stomach pain with a knot inside. The employing establishment controverted the claim and indicated that the disability was not caused by a traumatic injury and there were different stories about what happened. It indicated that the injury occurred by the “mere appearance of [employing establishment] police responding to altercation; during telephone conversation, [appellant] stated police pushed him.” The employing establishment related that, prior to returning to his office, he was unloading boxes all day. It did not indicate if appellant stopped work.

In an October 31, 2012 report, Dr. Wayne Benson, a neurologist, advised that he had treated appellant for a work-related injury sustained to his left ankle and left leg while at the employing establishment. He indicated that appellant was totally disabled from October 31 to November 30, 2012.

By letter dated November 1, 2012, OWCP advised appellant that additional factual and medical evidence was needed. It noted that the employing establishment provided differing accounts of what had occurred.

In a letter dated November 1, 2012, Daniel Salinas, a human resource specialist, stated that appellant had initially reported that while entering his work facility, he observed the employing establishment police responding to a hostile incident, and he began to experience immediate stress and emotional annoyance, which later manifested as left-sided pain and an abdominal knot. However, the claim form completed by appellant indicated that he developed left leg pain, left foot pain, and left stomach knot pain, while receiving keys. Mr. Salinas explained that, in a telephone conversation on October 29, 2012, appellant reported that his doctor had removed him from duty for an undetermined time due the knot in his stomach. He explained that, when he asked appellant about the injury, appellant explained that he had been unloading boxes all day and, at the end of his shift on return to his office, he noticed VA police responding to an altercation and that the police pushed him out of the way. Mr. Salinas also noted that the employing establishment had conducted an investigation with the internal police and it was confirmed that there had been no physical contact with appellant.

In a November 5, 2012 statement, appellant noted that at the time of his injury, he was standing on the steps of building 47 receiving the keys from workers. He explained that he was delivering supplies earlier off the dock and going upstairs when “all of a sudden a sharp pain came up my legs and a knot was felt in my stomach.” Appellant indicated that he notified his supervisor, Michael Richardson, and informed him of the pain in his left side, ankle, and leg. Regarding the immediate effects of his injury, he explained that he rubbed pain cream, took naproxen, and made an appointment to see a physician. Appellant denied having any other injury.

A November 11, 2012 left ankle magnetic resonance imaging (MRI) scan from Dr. Daniel James Kirzeder, a Board-certified diagnostic radiologist, revealed the anterior talofibular ligament was thinned with minimal adjacent soft tissue edema suggesting sprain and possible partial thickness tear with no evidence of acute fracture or bone marrow contusion.

By decision dated December 11, 2012, OWCP denied appellant's claim finding that he had not established an injury as alleged. It found that the evidence failed to demonstrate a specific event, incident or exposure at the time, place, and in the manner alleged. OWCP explained that appellant had provided differing accounts of how his injury had occurred.

In an October 31, 2012 report, Dr. Benson reported that appellant had hurt his left ankle unloading a truck. He diagnosed a left ankle sprain. Dr. Benson opined that the injury occurred while appellant was in the performance of duty at work as a supervisor. He explained that appellant had twisted his ankle while unloading a truck and had sustained a partial tear of the talofibular ligament. In a December 6, 2012 report, Dr. Benson noted that he had treated appellant for a work-related injury to his left ankle and leg while at work and that appellant could not stand or walk for prolonged periods. Dr. Benson found appellant totally disabled from December 6, 2012 to January 6, 2013.

On January 28, 2013 appellant requested reconsideration. He submitted copies of previously received reports and physical therapy treatment notes. Also submitted were copies of e-mail correspondence from appellant indicating that he had filed for disability retirement.

In an April 7, 2013 decision, OWCP denied modification of its prior decision. It found that appellant's inconsistent statements, as well as his ability to continue working, cast doubt upon the validity of his claim.

On April 30, 2013 appellant again requested reconsideration. He argued that he had sustained an injury on October 24, 2012 and that he had a knotted blood clot under his left foot. Appellant indicated that he twisted his foot while walking up the stairs at Building 47, an old warehouse building. He indicated that his foot slipped between the stairs and he continued to walk the grounds unloading supplies all day. Appellant explained that his pain started that evening. OWCP also received copies of previously submitted reports.

By decision dated May 24, 2013, OWCP denied modification of its prior decision.

In a September 19, 2013 report, Dr. Benson indicated that appellant was performing his daily duties when he was "on some stairs in Building 47 to get some keys from another employee when his left foot slipped between the steps as he was going up the stairs and he twisted and injured his left ankle/foot." Appellant related that he continued working even though he was having some pain in his left ankle/foot which worsened later that evening. Dr. Benson opined that it was the slipping of his foot between the steps that caused a traumatic injury to his left ankle while he was performing his regular job duties on October 24, 2012.

On September 27, 2013 appellant's then-representative again requested reconsideration. He argued that the injury occurred in the Building 47 stairway as appellant was retrieving keys from another employee, when his left foot slipped between steps and twisted causing his injury. He resubmitted medical reports.

By decision dated February 12, 2014, OWCP denied modification of the prior decision.

In a letter dated June 25, 2014, appellant's then-representative again requested reconsideration and submitted several arguments in support of the claim. With regard to the factual component of appellant's claim, he argued that on October 24, 2012 appellant experienced a very difficult day. Appellant had initially unloaded supplies on the loading dock. Afterward, finding no transport vehicles available, appellant had to transport supplies around Building 47 manually carrying buckets, mops, and trash cans throughout the day. The representative stated that while appellant was ascending the stairs to obtain some keys from employees, his left foot slipped between some of the stairs causing his left ankle to twist and hyperextend. He argued that the injury caused sharp pain in his left ankle and leg which travelled up into his stomach, but despite the pain, appellant continued to work the rest of the day. As the day progressed, appellant's pain worsened. OWCP also received physical therapy notes and a janitor supervisor job description.

In e-mail correspondence dated October 29, 2012, Mr. Salinas argued several points. He explained that appellant had completed a Form CA-1 on October 29, 2012, claiming emotional stress/traumatic injury. Mr. Salinas stated that appellant had reported returning to his office, on October 24, 2012, at approximately 2:30 p.m. and at the same time police officers were responding to an altercation between two other employees. He noted that, in a telephone interview with appellant, he had reported being pushed by police officers. Mr. Salinas noted that appellant was claiming left leg and abdomen injury, and a knot in his left side. He indicated that it was unclear if appellant was claiming these injuries as a result of being pushed or due to the mere presence of the police officers response.

An October 25, 2012 incident report reflected that at approximately 2:30 p.m. to 2:45 p.m. on October 24, 2012, appellant observed the police entering his place of employment responding to a hostile incident and appellant began to experience immediate stress and emotional annoyance. Later, outside of Buildings 46 and 47, he began feeling a sharp pain in his left side and lower abdomen where a knot started rising in his stomach.

In an October 29, 2012 report of contact, Mr. Salinas noted that appellant contacted him *via* telephone and to complete the traumatic injury claim. Appellant reported having a knot in his stomach, that he had been unloading boxes all day and, at the end of his tour, he was returning to his office to turn keys in and noticed that two other employee were having a confrontation. He claimed that the employing establishment police officers were responding to an altercation pushed him out of the way. Appellant stated that he reported to his supervisor the next day.

By decision dated April 15, 2015, OWCP denied modification of its prior decision. It noted the inconsistent statements as to the occurrence of the alleged injury.

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 and that an injury was sustained in the performance of duty.² These are the essential elements of each compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.³

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the fact of injury has been established. There are two components involved in establishing the 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.⁴ In some traumatic injury cases, this component can be established by an employee's uncontroverted statement on the Form CA-1.⁵ 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.⁶

An alleged work incident does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty, but the employee's statement must be consistent with the surrounding facts and circumstances and his subsequent course of action.⁷ A consistent history of the injury as reported on medical reports to appellant's supervisor and on the notice of injury can also be evidence of the occurrence of the incident.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 Although 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 an employee has not met this burden when there are inconsistencies in the evidence such as to cast serious doubt upon the validity of the claim.¹¹

² *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

³ *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁴ *Julie B. Hawkins*, 38 ECAB 393, 396 (1987).

⁵ *John J. Carlone*, 41 ECAB 354 (1989).

⁶ *See id.* For a definition of the term "injury," see 20 C.F.R. § 10.5(ee).

⁷ *Rex A. Lenk*, 35 ECAB 253, 255 (1983).

⁸ *Id.* at 255-56.

⁹ *Dorothy M. Kelsey*, 32 ECAB 998 (1981).

¹⁰ *Id.*

¹¹ *Joseph A. Fournier*, 35 ECAB 1175 (1984).

ANALYSIS

The Board finds that appellant's statements are insufficient to establish fact of injury due to the conflicting evidence regarding the time, place, and manner in which the alleged incident occurred.

In his October 29, 2012 traumatic injury claim, appellant indicated that, while receiving keys, he had left leg pain, left foot pain, and stomach pain with a knot inside. The employing establishment, on the claim form, noted that there were "different stories about what happened" and that appellant related that the injury occurred by the "mere appearance" of police responding to an altercation on the premises, with appellant also asserting that the police pushed him. When OWCP requested additional information, appellant provided a November 5, 2012 statement advising that, at the time of his injury, he was standing on the steps of Building 47 receiving keys from workers when, "all of a sudden a sharp pain came up my legs and a knot was felt in my stomach."

The employing establishment also provided an incident report in which appellant reported that on October 24, 2012, around 2:30 p.m. to 2:45 p.m., he observed the police entering Building 46 and he began to experience immediate stress and emotional annoyance. The report also indicated that, afterwards, outside, Buildings 46 and 47, appellant began feeling a sharp pain in his left side and lower abdomen where a knot started rising up his stomach. Appellant reported that "he mashed the knot down and now it resides in his lower left stomach. I still feel pain my left side, left abdomen, and left leg. There is tingling in the left leg. I was collecting the keys from 'CWT' workers at the end of his shift."

On June 25, 2014 appellant's representative explained that appellant had to manually transport supplies around Building 47 and that, while ascending stairs to get keys from employees, his left foot slipped between some of the stairs causing his left ankle to twist and hyperextend. He argued that the injury caused sharp pain in his left ankle and leg which travelled up into his stomach.

The Board finds that the totality of the evidence is insufficient to establish that an incident involving his left ankle occurred on October 24, 2012. Rather it suggests possibly that an emotional incident may have occurred.¹² The statements from appellant are not clear and are inconsistent. The Board notes that, in the October 25, 2012 incident report, appellant described the incident regarding the police as causing a knot in his stomach and causing pain in his left side, left abdomen, and left leg and tingling. No mention is made of any twisting of the left ankle. Appellant's statement on his October 29, 2012 claim form does not mention the police but does note that he had a knot rising in his stomach and makes no mention of twisting his left ankle. Despite several denials of his claim because of such factual inconsistencies, appellant has not explained these discrepancies between the initial evidence of record which suggests an

¹² To the extent that appellant is seeking an emotional condition, he may wish to file a separate claim for an occupational disease.

emotional reaction and subsequent evidence which suggests a physical twisting injury to the left ankle which was not mentioned in the most contemporaneous evidence.¹³

The circumstances of this case, therefore, cast serious doubt upon the occurrence of an October 24, 2012 incident in the manner as described by appellant. Given the inconsistencies in the evidence regarding how he sustained his injury, the Board finds that appellant has not met her burden of proof to establish that she sustained a traumatic incident in the performance of duty on October 24, 2012, as alleged.¹⁴

As appellant has not established that the claimed incident occurred, it is not necessary to consider the medical evidence with respect to causal relationship.¹⁵

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 a traumatic injury in the performance of duty on October 24, 2012.

¹³ See *S.S.*, 59 ECAB 315 (2008) (the Board has held that contemporaneous evidence is entitled to greater probative value than later evidence).

¹⁴ See *Matthew B. Copeland*, 6 ECAB 398, 399 (1953) (where the Board found that discrepancies and inconsistencies in appellant's statements describing the injury created serious doubts that the injury was sustained in the performance of duty); see also *Mary Joan Coppolino*, 43 ECAB 988 (1992).

¹⁵ *S.P.*, 59 ECAB 184 (2007) (where a claimant did not establish an employment incident alleged to have caused his or her injury, it was not necessary to consider any medical evidence).

ORDER

IT IS HEREBY ORDERED THAT the April 15, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 11, 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