

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

P.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Clearwater, FL, Employer**

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**Docket No. 15-1338
Issued: September 13, 2016**

Appearances:

Alan J. Shapiro, Esq., for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On May 28, 2015 appellant, through counsel, filed a timely appeal of an April 27, 2015 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 over the merits of this case.

ISSUE

The issue is whether appellant established a left knee injury on May 2, 2013 in the performance of duty.

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, counsel contends the decision is contrary to law and fact.

FACTUAL HISTORY

Appellant, then a 50-year-old city carrier, filed a traumatic injury claim (Form CA-1) on May 2, 2013 alleging that on that date at 2:13 a.m. she injured her knee in the performance of duty. Under cause of injury she noted “dates for palm tree.” The employing establishment, on the back of the form, reported that notice of the injury was first received on May 20, 2014. The employing establishment noted that appellant’s usual work hours were from 7:30 a.m. to 3:00 p.m. and that she did not stop work.

By letter dated May 29, 2014, OWCP informed appellant that the evidence of record was insufficient to establish her claim. Appellant was advised as to the medical and factual evidence required and afforded her 30 days to provide this information. In response to OWCP’s request, the following evidence was submitted.

In reports dated August 13, September 23, and October 22, 2013, Dr. Claude Barosy, a family practitioner, provided physical examination findings and diagnosed status postoperative lumbar laminectomy and fusion, lumbar disc syndrome, lumbar disc disease with radiculopathy, and internal derangement of the right knee, shoulder, elbow, wrist, and hip. He noted an employment injury date of June 24, 2013 in all of his reports. In the September 23, 2013 report, Dr. Barosy indicated that appellant was seen for complaints of leg pain and numbness. He related that she had reported falling due to numbness of her feet. In the October 22, 2013 follow-up report, Dr. Barosy reported that appellant fell at home on October 15, 2013 as the result of her back conditions and knee joint stability. He opined that she was totally disabled from work.

In a June 5, 2014 statement, appellant explained that she was delivering mail to a house that had scattered date nuts in the grass and on the driveway, she slipped on some of the scattered nuts and fell down onto her left knee and back, landing on the driveway. The accident was witnessed by four men and she immediately called her supervisor who investigated the incident. Due to the fall, appellant sustained a huge abrasion, blood running down her left leg, and a huge bump the size of a goose egg under the abrasion. She also noted that she had sustained another employment injury on June 24, 2013 under OWCP File No. xxxxxx387. Appellant related that she fell again in August 2013 when her knee gave out while she was leaving her physician’s office.

Appellant submitted reports covering the period October 28, 2013 to February 17, 2014 from Dr. Jairo D. Libreros-Cupido, a treating neurologist, who diagnosed cervical disc syndrome and disc disease with radiculopathy, lumbosacral disc syndrome and disc disease with radiculopathy, and bilateral knee internal derangement. Dr. Libreros-Cupido provided physical examination findings, reviewed diagnostic tests, and reported an injury date of June 24, 2013. On October 28, 2014 he reported employment injury dates of January 6, 2010, which involved her back and left shoulder, and June 24, 2013, which involved her back, right shoulder, knee, and elbow.

By decision dated July 7, 2014, OWCP denied the claim as there was no medical evidence of record containing a diagnosis causally related to the alleged May 2, 2013 incident.

On July 23, 2014 OWCP received appellant's July 15, 2014 request for a telephonic hearing before an OWCP hearing representative. A telephonic hearing was held on February 10, 2015.

Subsequent to the hearing, counsel submitted a February 18, 2015 report by Dr. Kevin L. Scott, a treating Board-certified orthopedic surgeon. Dr. Scott noted that appellant was seen for an evaluation of her left knee. He reported that on May 2, 2013 she tripped on nuts that fell from a tree and hurt her left knee. A review of a January 2, 2014 magnetic resonance imaging (MRI) scan showed a medial mensical posterior horn tear and some narrow edema over the distal femoral diaphysis while an early MRI scan performed on November 8, 2013 showed severe anterolateral tibial plateau bone bruise and posterior horn medial mensical tear. Dr. Scott diagnosed a left medial mensical tear due to the May 2, 2013 incident. He also diagnosed lumbar disc syndrome with myelopathy, bilateral lower extremities radiculopathy, and depression due to chronic pain and employment-related injuries. Dr. Scott opined that appellant's statements regarding the May 2, 2013 incident were truthful and consistent with the medical and factual findings. He also opined that she was totally disabled from performing any type of work.

By decision dated April 27, 2015, the hearing representative affirmed the denial of appellant's claim. He found that she had failed to submit sufficient factual and medical evidence to establish fact of injury, as defined by FECA. In reaching this conclusion, the hearing representative noted particularly the late filing of the claim, the lack of witness statements which appellant alleged had disappeared, and the lack of contemporary medical evidence with a correct history of the injury.

LEGAL PRECEDENT

An employee seeking benefits under FECA³ has the burden of proof to establish 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 filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged, and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.⁴ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.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.⁶

³ *Id.*

⁴ C.S., Docket No. 08-1585 (issued March 3, 2009); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

⁵ *S.P.*, 59 ECAB 184 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁶ *B.F.*, Docket No. 09-60 (issued March 17, 2009); *Bonnie A. Contreras*, *supra* note 4.

First, the employee must submit sufficient evidence to establish that she actually experienced the employment incident at the time, place, and in the manner alleged.⁷ 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.⁸

ANALYSIS

It is appellant's burden of proof to establish all of the elements of her claim. She must prove her employment, the time, place, and manner of injury, a resulting personal injury, and that her injury arose in the performance of duty. Appellant filed a traumatic injury claim alleging that on May 2, 2013 she injured her left knee in the performance of duty. The form was dated May 2, 2013, but was not received by the employing establishment until May 20, 2014. By decision dated July 7, 2014, OWCP denied the claim as it found that appellant failed to establish a diagnosed medical condition causally related to the May 2, 2013 incident. A hearing representative modified the prior decision, but affirmed the denial of the claim. The hearing representative found that appellant had not established that she sustained an injury at the time, place, and in the manner alleged.

The Board finds that appellant has failed to establish a traumatic injury in the performance of duty on May 2, 2013, as alleged. Appellant's presentation of the facts is not supported by the evidence of record and does not establish that the alleged event occurred at the time, place, and in the manner alleged.⁹

Inconsistencies in the record cast serious doubt on the validity of appellant's claim. Appellant alleged that she sustained left knee and back injuries in the performance of duty on May 2, 2013 at 2:13 a.m. due to tripping on dates from a palm tree.¹⁰ The employing establishment reported that it first received notice of the injury on May 20, 2014 and explained that her work hours were from 7:30 a.m. to 3:00 p.m., and that she did not stop work following the incident. There is no contemporaneous medical evidence that appellant sought medical treatment following the alleged incident. The first medical report OWCP received was an August 13, 2013 report by Dr. Barosy, who noted an employment injury date of June 24, 2013. Subsequent reports from Dr. Barosy also note a June 24, 2013 injury date as does Dr. Libreros-Cupido, who also referenced an injury date of January 6, 2010. While he noted that prior to June 24, 2013 appellant had fallen twice, he does not specify the dates or the cause of the falls.

Subsequent to the oral hearing, before the Branch of Hearings and Review, appellant submitted Dr. Scott's February 18, 2015 report. Dr. Scott reported that appellant originally

⁷ *D.B.*, 58 ECAB 464 (2007); *David Apgar*, 57 ECAB 137 (2005).

⁸ *C.B.*, Docket No. 08-1583 (issued December 9, 2008); *D.G.*, 59 ECAB 734 (2008); *Bonnie A. Contreras*, *supra* note 4.

⁹ *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

¹⁰ While the claim form indicated that the injury occurred at 2:13 a.m., this appears to be an unexplained typographic error.

injured her knee on May 2, 2013 due to tripping on nuts, which fell from a tree, while delivering mail. He diagnosed left medial meniscal tear due to the May 2, 2013 incident. This report was written almost two years after the alleged employment incident and therefore does not provide the necessary contemporaneous medical evidence to support that the employment incident occurred as alleged.¹¹

Appellant has not established that the incident occurred in the manner alleged.¹² While she signed her Form CA-1 on May 2, 2013, notification to the employing establishment did not occur until May 20, 2014, more than one year after the incident. Appellant also noted that the injury occurred at 2:13 a.m. on May 2, 2013 when her tour-of-duty hours were 7:30 a.m. to 3:00 p.m. There were no witness statements provided in support of her claim. While an injury does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty, the employee's statement must be consistent with the surrounding facts and circumstances and her subsequent course of action.¹³

The Board finds that circumstances surrounding appellant's account of an employment incident, including her delay in notifying the employing establishment of the incident and the lack of any contemporaneous medical evidence showing that she sought medical attention for this incident cast doubt on her claim.¹⁴ Appellant has failed to establish fact of injury as she did not submit sufficient evidence to establish that she actually experienced an employment incident at the time, place, and in the manner alleged.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 failed to establish a left knee injury on May 2, 2013 in the performance of duty.

¹¹ See *Conard Hightower*, 54 ECAB 796 (2003) (the Board has held that contemporaneous evidence is entitled to greater probative value than later evidence).

¹² *Supra* note 9.

¹³ *B.W.*, Docket No. 13-244 (issued May 13, 2013); *Barbara R. Middleton*, 56 ECAB 634 (2005).

¹⁴ *C.B.*, Docket No. 14-0671 (issued August 24, 2015).

¹⁵ *P.T.*, Docket No. 09-2289 (issued August 16, 2010); *supra* note 9.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 27, 2015 is affirmed.

Issued: September 13, 2016
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board