

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

K.D., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Lyndhurst, NJ, Employer**

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**Docket No. 16-1864
Issued: February 8, 2017**

Appearances:
Stephen Larkin, 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 September 17, 2016 appellant, through his representative, filed a timely appeal from a May 10, 2016 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 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 April 7, 2014 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 appellant's representative asserts that the evidence of record establishes that appellant was injured at work on April 7, 2014 when his supervisor barreled into him, causing him to fall or, in the alternative, that his fall on April 7, 2014 was unexplained and, therefore, compensable.

FACTUAL HISTORY

This case has previously been before the Board. In a November 24, 2015 decision, the Board affirmed June 25 and March 23, 2015 merit decisions of OWCP. The Board found that, because there were significant inconsistencies in appellant's description of a claimed assault and how he fell, this cast serious doubt as to whether the employment incident occurred as alleged. Therefore, appellant had not met his burden of proof to establish an employment-related injury on April 7, 2014.³

On February 10, 2016 appellant, through his representative, requested reconsideration before OWCP. He submitted evidence previously of record that had been reviewed by both OWCP and the Board. New evidence which he submitted included a statement dated February 8, 2016 in which appellant alleged that an April 7, 2014 emergency room report contained an incorrect history of injury, noting that an emergency room doctor recorded that appellant was hit in the head. Appellant maintained that this was not what he told the physician and that, due to pain and a long wait for treatment, he was disoriented. He insisted that the physician did not record a correct history of injury and that he had told the physician that the supervisor banged into him with his shoulder. A "Probable Cause Statement," filed with the Lyndhurst Municipal Court, completed and signed by appellant on April 9, 2014, provided as a history of the incident. Appellant reported that he was walking to his window position, that K.F. was coming in the opposite direction, and that as appellant neared, K.F. lowered his shoulder and barreled into appellant knocking him to the floor.

On February 1, 2016 Dr. Deborah Eisen, Board-certified in family medicine, diagnosed a proximal patellar tendon tear of each knee. She opined, "It is still my opinion, with a reasonable degree of medical certainty, the injuries to the knees that only include patellar tendon tear would have only occurred due to the incident involving his supervisor as was described above. The reason for this opinion is the act of being pushed or bumped by his supervisor shoulder to shoulder unprepared would cause the patient's upper body to move before the lower portion without having control causing both patellar tendons to tear."

By merit decision dated May 10, 2016, OWCP found that, because the factual evidence of record did not support that the April 7, 2014 incident occurred as alleged, the issue of whether

³ Docket No. 15-1547 (issued November 24, 2015). On April 8, 2014 appellant, then a 59-year-old retail associate/window clerk, filed a traumatic injury claim alleging that on April 7, 2014, K.F., a customer services manager, lowered his shoulder and barreled into appellant knocking him to the concrete floor. Appellant stated that he could not get up, and an ambulance was called. Appellant stopped work at that time. An emergency department record dated April 7, 2014 Dr. Allison Lam, Board-certified in emergency medicine, provided a history that appellant stated he was hit in the head with a manager's elbow and pushed to the ground. The discharge diagnosis was "right knee sprain." In an April 7, 2014 statement, R.D., a supervisor, advised that, as he was sitting at his desk, he noticed appellant walking and K.F. breaking down mail. R.D. noted that when he turned his head, he saw appellant walking backward really fast, as if he had lost his balance, and then appellant landed on the floor.

appellant had an unexplained fall that day was not an issue before OWCP. It denied appellant's claim that he was injured on April 7, 2014 in the performance of duty.

LEGAL PRECEDENT

An employee seeking compensation under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of reliable, probative, and substantial evidence,⁴ including that he or she is an "employee" within the meaning of FECA, and that the claim was filed within the applicable time limitation.⁵ The employee must also establish that he sustained an injury in the performance of duty as alleged, and that disability for work, if any, was causally related to the employment injury.⁶

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.⁷

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.⁸ 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.⁹

ANALYSIS

The Board finds that, because the record contains contradictory evidence regarding the claimed work incident of April 7, 2014, appellant has not established that this incident occurred as alleged.

⁴ *J.P.*, 59 ECAB 178 (2007).

⁵ *R.C.*, 59 ECAB 427 (2008).

⁶ *Id.*; *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁷ *T.H.*, 59 ECAB 388 (2008).

⁸ *R.T.*, Docket No. 08-408 (issued December 16, 2008).

⁹ *Betty J. Smith*, 54 ECAB 174 (2002).

In his February 8, 2016 statement submitted on reconsideration, appellant alleged that an emergency room physician recorded an incorrect history of injury. In the emergency department record on April 7, 2014 Dr. Lam recorded a history that appellant was hit in the head by a manager's elbow and was pushed to the ground.¹⁰ In his February 8, 2010 statement, appellant maintained that he told the doctor that his supervisor had banged into him with his shoulder. In the previously submitted "Probable Cause Statement" signed by appellant on April 9, 2014 and submitted with his February 6, 2016 reconsideration request, appellant maintained that, as he was walking to his window position, K.F. was coming in the opposite direction and, as appellant neared, K.F. lowered his shoulder and barreled into appellant and knocked him to the floor.

Appellant also resubmitted an April 7, 2014 statement, from R.D, another supervisor. This was described in the Board's November 24, 2015 decision. R.D. did not witness an assault or any physical contact between appellant and K.F.¹¹

There continues to be significant inconsistencies in appellant's description of the claimed assault and how he fell, sufficient to cause serious doubt as to whether the employment injury occurred as alleged.¹² The Board therefore concludes that the evidence submitted on reconsideration, together with the evidence previously of record, continues to provide different versions of the April 7, 2014 event.

As appellant has failed to establish that the alleged April 7, 2014 employment incident occurred as alleged, it is unnecessary to review the medical evidence of record.¹³

As to appellant's assertion on appeal that the fall was unexplained, OWCP procedures explain that in cases where a fall may have been caused by a personal and non-occupational pathology, OWCP must address whether the fall was idiopathic or unexplained.¹⁴ Such is not at issue in this case as appellant has consistently maintained that he was assaulted by K.F. and this caused the fall.

CONCLUSION

The Board finds that appellant failed to meet his burden of proof to establish an employment-related injury on April 7, 2014.

¹⁰ *Supra* note 3.

¹¹ *Id.*

¹² *Supra* note 9.

¹³ *See D.R.*, Docket No. 15-1281 (issued September 16, 2015).

¹⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Idiopathic Falls*, Chapter 2.804.9 (August 1992).

ORDER

IT IS HEREBY ORDERED THAT the May 10, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 8, 2017
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