

ISSUE

The issue is whether appellant met his burden of proof to establish a traumatic injury in the performance of duty on April 1, 2015, as alleged.

On appeal counsel argues that the decision is contrary to fact and law.

FACTUAL HISTORY

On September 16, 2016 appellant, then 51-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that, on April 1, 2015, he fractured his left ankle when he stepped on an uneven sidewalk surface. On the reverse side of the claim form the employing establishment controverted the claim as appellant was on his break at the time of the alleged incident. It also noted that appellant continued to work without complaint and did not report the injury until September 16, 2016.

In support of his claim, appellant submitted an April 19, 2015 magnetic resonance imaging (MRI) scan diagnosing a complete tearing of the Lisfrano ligament of the second and third metatarsal homolateral translation, distal posterior tibialis tendon low grade partial thickness tear, and second, third, and fourth metatarsal base fractures.

By development letter dated September 23, 2016, OWCP informed appellant that the evidence of record was insufficient to establish his claim. It advised appellant of the type of medical and factual evidence required and attached a factual development questionnaire for his completion. OWCP afforded appellant 30 days to provide the requested information.

On September 27, 2016 OWCP received e-mail correspondence dated September 20, 2016 from B.F., stating that she was a tour 1 supervisor in charge of the annex until April 15, 2015. B.F. did not remember appellant reporting an injury, but did remember that appellant had a toe amputated at about that time, and that he came to work with a swollen foot.

In an undated witness statement, P.P., a coworker, noted that on the last day he worked with appellant he observed appellant favoring one of his legs and hobbling. Appellant showed P.P. a swollen leg when he asked if he was okay. P.P. stated that appellant continued to work until the end of his tour of duty.

On a May 6, 2015 treatment validation form, Dr. Sean Kersh, a treating podiatrist, diagnosed dislocated left foot. He indicated that appellant's left foot condition would require surgery. Dr. Kersh requested that appellant be excused from work until July 6, 2015.

In a June 16, 2015 statement, R.B., a coworker, related witnessing appellant's swollen ankle and foot. R.B. further noted that appellant did a lot of standing and that the swelling increased as appellant's tour of duty progressed.

In a June 17, 2015 statement, E.L., a coworker, noted that he worked with appellant and that he saw appellant's ankle was purple and blue when appellant removed his shoe and sock. He recommended that appellant have his ankle checked, which appellant stated he would do once he was finished with work.

Dr. Kersh, on June 17, 2015, noted that appellant would be off work for approximately three months following his surgery. On July 30, 2015 he related that appellant was scheduled for surgery on September 11, 2015, after which he would be able to perform sedentary work/light-duty desk work. Dr. Kersh related in a November 10, 2015 note that he had released appellant to return to work that day with restrictions of no prolonged walking or standing.

The record contains letters noting continuing treatment performed in 2016 dated May 27 and July 11, 2016 by Dr. Thomas Zgonis, a treating podiatrist, and February 29 and April 18, 2016 by Dr. Daniel J. Short, a treating podiatrist.

In a September 16, 2016 statement, appellant related that he injured his ankle on April 1, 2015 walking from the parking lot to the annex following his break. Specifically, he stated that he twisted his foot when stepping on the edge of the sidewalk. Following the injury, appellant continued to work although his coworkers noticed his ankle and foot swelling. He also stated he showed the injury to a supervisor and that the accident occurred on employing establishment premises.

On September 30, 2016 A.P., Health and Resource Management Specialist, controverted appellant's claim. He stated that appellant did not report the incident so the employing establishment was unable to conduct an investigation. A.P. also observed that appellant continued to work for seven weeks with no loss work time, incident or complaint. Appellant only reported the incident to management one year and five months after the claimed injury. Moreover, A.P. contended that appellant was not in the performance of duty at the time of the alleged incident as it occurred while appellant was returning from a personal break.

By decision dated October 25, 2016, OWCP denied appellant's traumatic injury claim. It found that appellant failed to establish that his left ankle condition was causally related to the accepted April 1, 2015 incident.

On November 3, 2016 appellant requested a telephonic hearing before an OWCP hearing representative, which was held on June 8, 2017. During the hearing, he testified that he was returning from his break at approximately 9:15 a.m. on April 1, 2015 when he twisted his ankle. At the time, appellant thought nothing of it as he had foot neuropathy; therefore, he continued working. Towards the end of the tour, he showed a supervisor, B.F., his swollen leg. Appellant testified that he showed his swollen leg to some coworkers, but there were no witnesses to when he allegedly twisted his ankle coming back from his break. He also related that he was a type II diabetic and had neuropathy which impacted sensation in his feet.

In a June 8, 2017 report, Dr. Helo Chen, a treating physician, noted an injury date of April 1, 2015 and diagnosed left ankle and foot Charcot's joint. He reported appellant continued to have daily left foot and ankle swelling and pain due. Dr. Chen opined that appellant experienced continued disability and pain from the work injury.

By decision dated August 2, 2017, an OWCP hearing representative affirmed the denial of appellant's claim. He found the evidence failed to establish that the April 1, 2015 incident occurred as alleged. In support of this conclusion, the hearing representative noted that appellant

continued to work for seven weeks following the alleged April 1, 2015 incident with no problem or reported the incident to a supervisor on April 1, 2015.

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 or specific condition for which compensation is claimed is 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 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.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

To establish that an injury occurred as alleged, the injury need not be confirmed by eyewitnesses, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.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.¹⁰ However, an employee's statement regarding the occurrence of an employment incident is of great probative force and will stand unless refuted by strong or persuasive evidence.¹¹

³ *Supra* note 2.

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. 09-0060 (issued March 17, 2009); *Bonnie A. Contreras*, *supra* note 4.

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

¹⁰ *Linda S. Christian*, 46 ECAB 598 (1995)

¹¹ *Gregory J. Reser*, 57 ECAB 277 (2005)

ANALYSIS

The Board finds that the evidence of record is insufficient to establish that the claimed employment incident occurred as alleged.

Appellant claimed to have sustained a left ankle injury on April 1, 2015 when he fractured his left ankle when he stepped off an uneven sidewalk surface. The employing establishment controverted the claim, noting that appellant did not file the claim or provide notice of injury until September 16, 2016. Appellant's supervisor also noted that appellant continued to work for seven weeks following the alleged injury without taking leave. Appellant also did not seek medical care until April 19, 2015.

In support of his claim, appellant submitted witness statements from coworkers. However, P.P., R.B., and E.L., all noted appellant's swollen foot/ankle, but did not mention a date of injury or indicate that they had witnessed the alleged incident.

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 his subsequent course of action. Appellant alleged the incident occurred on April 1, 2016, but he did not file a claim until September 16, 2016. He also continued to work without complaint or loss of work time for seven weeks following the alleged incident, did not respond to OWCP's request for detailed information about how the work incident occurred¹² and did not provide a clarifying explanation as to why he waited over 16 months to file a claim after the alleged injury.¹³

As the foregoing inconsistencies cast serious doubt concerning whether appellant was injured at work on April 1, 2015 in the performance of duty, the Board finds that he has not met his burden of proof to establish an injury in the performance of duty. Because appellant 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 the alleged employment incident of April 1, 2015.¹⁴

On appeal counsel contends that OWCP's decision was contrary to fact and law. Based on the findings and reasons stated above, the Board finds that the counsel's arguments are unsubstantiated.

¹² See *E.R.*, Docket No. 17-0742 (issued June 26, 2017) (OWCP notified appellant of the additional factual evidence needed to support that the claimed incident occurred as alleged; as he did not submit such evidence, appellant has failed to meet his burden of proof).

¹³ *J.B.*, Docket No. 14-1421 (issued November 14, 2014); *Betty J. Smith*, 54 ECAB 174 (2002) (notification of injury, if otherwise unexplained, may cast doubt on an employee's statement that an injury occurred as alleged).

¹⁴ See *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

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 a traumatic injury in the performance of duty on April 1, 2015, as alleged

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 2, 2017 is affirmed.

Issued: April 2, 2018
Washington, DC

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

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

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