United States Department of Labor
Employees' Compensation Appeals Board

D.C., Appellant	)	
and	)	**Docket No. 17-0161**
	)	**Issued: June 15, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Tampa, FL, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 1, 2016 appellant, through counsel, filed a timely appeal from a September 12, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[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.*

ISSUE

The issue is whether appellant has met her burden of proof to establish an injury in the performance of duty on July 20, 2015, as alleged.

FACTUAL HISTORY

On August 3, 2015 appellant, a 61-year-old rural carrier, filed a traumatic injury claim (Form CA-1), alleging an injury to her right knee on July 20, 2015 while in the performance of duty. She stated that the floor was wet, as it was raining that day, and she slipped and fell on her knees, badly injuring her postoperative right knee. Appellant has a previously accepted claim under OWCP File No. xxxxxx448 for right knee arthritis and lateral meniscus tear and underwent an authorized right knee replacement surgery in February 2015. She had returned to full-duty work on July 20, 2015 after working in a light-duty capacity. On July 23, 2015 appellant returned to work in a light-duty capacity for a second time.

In an August 14, 2015 narrative statement, appellant indicated that on July 20, 2015 she had returned from her route after completing her deliveries, carried her dispatch mail into the office, and sorted it before returning to her mail truck. She stated that it had been raining most of that afternoon and, upon returning to the office through the back double doors, he slipped on the wet floor and fell. Appellant asserted that she landed on her right knee, for which had undergone replacement surgery in February 2015. She further indicated that she was trying to get up when she heard T.M., a clerk, yelling at her to stay down and not move. T.M. then informed appellant's supervisor P.S. of the fall. P.S. came running over and helped appellant up. Appellant stated that her knee immediately began to swell and she could not bend it. She was not offered any paperwork, but she did go to the hospital and had an x-ray.

In an August 3, 2015 attending physician's report (Form CA-20), Dr. Sara Vizcay, a Board-certified family practitioner, reported that appellant had a partial knee replacement in February 2015 and was returned to work on a full-duty capacity. She asserted that on July 20, 2015 appellant sustained a blunt force hit to her postoperative right knee when she slipped and fell on a wet floor at work injuring her right knee. Dr. Vizcay diagnosed meniscal tear and knee contusion. In reports dated August 4 and September 8, 2015, she reiterated appellant's factual history of the claim and diagnosed postoperative partial knee replacement with aggravation due to new injury, right knee medial meniscal tear, and depression secondary to chronic pain and work-related injuries.

On August 19, 2015 Dr. Kevin Scott, a Board-certified orthopedic surgeon, diagnosed postoperative partial knee replacement with aggravation due to new injury, right knee medial meniscal tear, depression secondary to chronic pain and work-related injuries, and right knee pain status post reinjury and unilateral knee replacement. He opined that overstretching, blunt force, and/or strain that appellant sustained upon the fall of July 20, 2015, to an already weak musculature, caused a contusion, synovial fluid leakage, and possible tear.

On September 4, 2015 appellant, through counsel, filed a claim for wage-loss compensation (Form CA-7).

In a September 18, 2015 development letter, OWCP indicated that when appellant's claim was received it appeared to be a minor injury that resulted in minimal or no lost time from work and, based on these criteria and because the employing establishment did not controvert continuation of pay or challenge the case, payment of a limited amount of medical expenses was administratively approved. It stated that it had reopened the claim for consideration because she filed a claim for wage-loss compensation. OWCP requested additional evidence and afforded appellant 30 days to respond to its inquiries.

In response, appellant submitted a narrative statement dated October 12, 2015 reiterating the factual history of her claim. She also submitted a September 24, 2015 statement from D.D., her daughter and coworker, who stated that appellant asked her to speak with T.M., a clerk who witnessed the fall. D.D. asked T.M if he could give her a witness statement and he replied, "I can't believe that they were questioning [appellant's] work accident. I saw her coming in the doors [when] she slipped and fell and I told her to stay down." D.D. indicated that T.M had stated that he had to see his union representative before he would give his statement in writing to avoid any retaliation.

In an October 4, 2015 witness statement, appellant's supervisor, P.S, reported that on July 20, 2015 appellant had reported to work for the first time in two years following a previous work injury. At approximately 5:00 p.m., he was standing at the supervisor's desk which was situated approximately 40 feet from the double doors through which the carriers entered when returning from the street. P.S. was working on the computer at the time of appellant's arrival and he heard moaning noises coming from the direction of the double doors. He recalled looking up in the direction of the moaning and seeing appellant on the floor. P.S did not recall hearing any noise prior to the moaning: no commotion, no noise from a fall. Appellant did not appear to be contorted in any form and was in a seated position. P.S immediately went over to her at which point she stated that she slipped while coming in through the doors. He noted that a couple of thin, empty plastic trays and her purse where on the ground beside her, but he had not heard any noise from these objects hitting the ground during the alleged fall.

In a statement received by OWCP on October 5, 2015, K.B., appellant's coworker, indicated that on July 20, 2015 at approximately 9:00 a.m. she had reported to work as scheduled. She was not informed that appellant was returning to full-duty status that day. K.B. was casing mail when appellant approached her after she returned to the office and advised her that she fell when she walked into the office while bringing her mail inside. She stated that she "did not witness her fall" and noted that to the best of her knowledge, no one else witnessed the incident.

Appellant also submitted medical evidence, including an October 12, 2015 report from Dr. Vizcay and an October 15, 2015 report from Dr. Scott.

By decision dated October 22, 2015, OWCP denied appellant's claim for an employment-related injury, finding that the evidence of record failed to establish that she fell on a wet floor on July 20, 2015 in the performance of duty, as alleged.

On November 10, 2015 counsel requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A telephonic hearing was held before an OWCP

hearing representative on June 29, 2016. Appellant provided testimony and the hearing representative held the case record open for 30 days for the submission of additional evidence.

Subsequently, appellant submitted a July 28, 2016 report from Dr. Vizcay who reiterated her diagnoses and opinions. She also submitted an April 5, 2016 report from Dr. Andrew Cooper, a Board-certified orthopedic surgeon, who asserted that appellant was injured on July 20, 2015 and diagnosed mechanical complication of internal right knee prosthesis and prosthetic joint implant, right.

In an August 22, 2016 narrative statement, appellant indicated that P.S.'s October 4, 2015 statement confirmed that he was made aware of the situation as he heard noise coming from the door area and there still remained a question as to why he never asked T.M. what he witnessed the day of the incident.

In a statement dated June 29, 2016, T.M. stated that he "witnessed a carrier fall down." He indicated that he was working at the employing establishment and remembered it was a rainy day. T.M. was not able to recall the "time, date, or the lady's name."

In a July 20, 2016 letter, the employing establishment controverted appellant's claim and indicated that the employees understood that retaliation for providing information to an investigation was not tolerated and would be considered a violation. Employees were asked if they witnessed anything that had happened and none of the employees replied that they were witnesses to the alleged July 20, 2015 incident. The employing establishment noted that T.M. was a union steward and, as such, had knowledge of contract issues, rules, regulations, and what actions could be taken if there were an issue of harassment or retaliation.

By decision dated September 12, 2016, OWCP's hearing representative affirmed the prior decision on the basis that the evidence submitted was insufficient to establish fact of injury as appellant did not submit factual evidence to support that the injury and/or events occurred. He found that the evidence cast serious doubt on the claim, particularly P.S. statement that he did not hear any noise from the alleged fall.

LEGAL PRECEDENT

An employee seeking benefits under FECA[3] 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 timely filed within the applicable time limitation period of FECA, that an injury[4] was sustained in the performance of duty as alleged,

[3] *Id.*

[4] 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).

and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.[5]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether "fact of injury has been established. A fact of injury determination is based on two elements. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time and 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 the claimed condition relates to the employment incident.[6]

An employee has the burden of proof to establish the occurrence of an injury at the time and place, and in the manner alleged, by a preponderance of the reliable, probative, and substantial evidence. An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury in the performance of duty, as alleged, but the employee's statements must be consistent with surrounding facts and circumstances and her subsequent course of action.[7] An employee has not met his or her burden of proof to establish the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim. 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 statement in determining whether a *prima facie* case has been established. 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.[8]

The employee must also submit sufficient evidence, generally only in the form a medical evidence, to establish that the employment incident caused a personal injury.[9]

ANALYSIS

In her narrative statements, appellant alleged that on July 20, 2015 she had returned back from her route after completing her deliveries, carried her dispatch mail into the office, and sorted it before returning to her mail truck. She stated that it had been raining most of the late afternoon and she slipped on the wet floor and fell down when returning to the office through the back double doors. Appellant asserted that she landed on her right knee, which had undergone replacement surgery in February 2015. She further indicated that she was trying to get up when she heard the clerk, T.M., yelling at her to stay down and not move. T.M. then informed her supervisor, S.B

[5] *See T.H.*, 59 ECAB 388 (2008).

[6] *Id.*

[7] *See Gene A. McCracken*, Docket No. 93-2227 (issued March 9, 1995).

[8] *See D.B.*, 58 ECAB 463 (2007).

[9] *See J.Z.*, 58 ECAB 529 (2007).

who came running over and helped her up. Appellant stated that her knee immediately began to swell and she could not bend it.

The employing establishment controverted appellant's claim based on the findings of an investigation. In a July 20, 2016 letter, it indicated that the employees understood that retaliation for providing information to an investigation was not tolerated and would be considered a violation. Employees were asked if they witnessed anything that had happened and none of the employees stated that they were witness to the alleged July 20, 2015 incident. K.B., appellant's coworker, asserted in her October 5, 2015 statement that she "did not witness her fall." The employing establishment noted that T.M. was a union steward and, as such, had knowledge of contract issues, rules, regulations, and what actions could be taken if there were an issue of harassment or retaliation. In his June 29, 2016 statement, T.M. asserted that he witnessed a carrier fall down, but was unable to recall the "time, date, or the lady's name."

The Board finds that the weight of the evidence is insufficient to establish that the employment incident of July 20, 2015 occurred as alleged.[10] Appellant stated that as she slipped and fell on a wet floor on July 20, 2015 when returning to the office through back double doors. T.M. indicated that he saw a carrier fall down, but his statement is not sufficient to establish appellant's claim because he could not remember the time, date, or name of the carrier.

In a September 24, 2015 statement D.D. indicated that she asked T.M. if he could give her a witness statement and he replied, "I can't believe that they were questioning [appellant's] work accident. I saw her coming in the doors [when] she slipped and fell and I told her to stay down." However, there is no corroborating evidence to establish that T.M. actually made this statement which comes before the Board wrapped in multiple levels of hearsay.[11]

Furthermore, P.S, appellant's supervisor, asserted in his October 4, 2015 statement that at approximately 5:00 p.m. on July 20, 2015 he was standing at the supervisor's desk which was situated approximately 40 feet from the double doors through which the carriers entered when returning from the street. He was working on the computer at the time of her arrival and he heard moaning noises coming from the direction of the double doors. P.S. recalled looking up in the direction of the moaning and seeing appellant on the floor. He did not recall hearing any noise prior to the moaning: no commotion, no noise from a fall. S.B. noted that a couple of thin, empty plastic trays and her purse where on the ground beside her, but he had not heard any noise from these objects hitting the ground during the alleged fall. The Board finds that S.B.'s statement casts serious doubt on appellant's claim, particularly that he did not hear any noise from her body or the

[10] *See A.B.*, Docket No. 14-0522 (issued November 9, 2015) (fact of incident not established where there was substantial inconsistency between appellant's account of events and the accounts of coworkers and supervisor with regard to the time and place of his alleged injury); *V.J.*, Docket No. 13-1460 (issued January 7, 2014) (claimed incident not established where employing establishment investigation revealed inconsistencies between appellant's account of the claimed incident and those of coworkers); *J.W.*, Docket No. 12-0926 (issued October 1, 2012) (claimed incident not established where there were inconsistencies between appellant's statements and evidence at the scene of the alleged incident).

[11] *See K.A.*, Docket No. 15-0684 (issued August 27, 2015) (where the claimant submitted a witness statement from his coworker who advised that another coworker had stated that B.T. was trying to get him fired, the Board found that there was not corroborating evidence to establish that B.T. actually made this statement).

objects she was holding hitting the ground when she fell. Thus, the Board finds that appellant has failed to provide sufficient factual evidence to establish that she fell on a wet floor at work on July 20, 2015, as alleged.

Since appellant failed to establish the first component of fact of injury, it is not necessary to discuss whether she submitted medical evidence sufficient to establish that a medical condition existed and whether the condition was causally related to the employment incident as alleged.[12] Thus, the Board finds that appellant has not met her burden of proof to establish an injury in the performance of duty on July 20, 2015, as alleged.

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 her burden of proof to establish an injury in the performance of duty on July 20, 2015, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the September 12, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 15, 2018
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

[12] *See Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997). As appellant failed to establish that the claimed event occurred as alleged, it is not necessary to discuss the probative value of medical evidence. *Id.*