United States Department of Labor
Employees' Compensation Appeals Board

W.R., Appellant	)	
and	)	**Docket No. 17-0287**
	)	**Issued: June 8, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Austin, TX, 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 21, 2016 appellant, through counsel, filed a timely appeal from a September 27, 2016 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 the claim.

[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 his burden of proof to establish a traumatic injury in the performance of duty on May 12, 2015, as alleged.

FACTUAL HISTORY

On May 12, 2015 appellant, then a 57-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that he had turned his ankle and fell forward while in the performance of duty at 11:00 a.m. that day while delivering mail to 2001 Deer Run.[3] He alleged injury to his right side, shoulder, and knee.

By development letter dated May 29, 2015, OWCP informed appellant that the evidence of record was insufficient to support his claim. It advised that additional factual evidence was needed to establish that he experienced the incident or employment factor alleged to have caused injury and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the requested information.

In a June 2, 2015 response, appellant stated that he was at 2001 Deer Run on May 12, 2015 when his injury occurred. This location was "a medical hop," and the mailbox was located by the front entry.[4] Appellant indicated that as he stepped out of his long life vehicle (LLV), his left ankle turned. He described his injury, noting that as he began to fall, he tried to catch himself, but lost his balance and fell. Appellant landed on his right side (mainly on his shoulder), pushed his right elbow into his ribs, and skinned his right knee on the concrete driveway. He stated that he had a feeling that a meter reader saw him fall, but he did not stop to get a statement as he was embarrassed and only said "hello." Appellant then continued his deliveries, "trying to shake off the pain," but his pain continually worsened. He asserted that he did not deviate from his route and he continued to deliver the mail as long as he could. Appellant stated that he called his supervisor when he arrived at 6600 Elm Creek Drive.

In a June 3, 2014 letter, the employing establishment controverted the claim indicating that appellant was not at the place and time he alleged on his Form CA-1. In support of its allegation, the employing establishment submitted a May 28, 2015 letter from appellant's supervisor and appellant's May 12, 2015 Managed Service Points (MSP) report, a detailed time analysis used to track the time and whereabouts of carriers. In his May 28, 2015 letter, appellant's supervisor, J.C., indicated that appellant had called him at approximately 1:30 p.m. on May 12, 2015 and stated that he had tripped and fallen at 11:00 a.m. at "2100 Deer Run." He went out to 2100 Deer Run to investigate the accident, but stated that that was not the correct address. Appellant then stated that the location was 2001 Deer Run. J.C. stated that according to MSP scans, appellant had scanned 1901 Deer Run at 12:01 p.m. and 2001 Deer Run was in the line of travel after 1901 Deer

[3] The Board notes that the CA-1 form originally appeared to indicate that 2100 Deer Run was the place where the injury occurred, but was corrected to reflect 2001 Deer Run. Appellant's supervisor, signed the claim form on May 12, 2015 and confirmed that 2001 Deer Run was the place where the injury allegedly occurred.

[4] The case record reflects that a "medical hop" is provided to persons with disabilities that prevent them from going to the curb to get their mail.

Run. On the attached MSP Carrier Report, a handwritten notation indicated that 2001 Deer Run was after 1901 Deer Run, so injury would have happened after 12:01 p.m.

Appellant's May 12, 2015 MSP Carrier Report indicated that he departed to his route at 9:50 a.m. His first delivery was scanned at 11:34 a.m. and the second delivery was scanned at 1901 Deer Run Drive at 12:01 p.m. He then made two other deliveries at 12:25 p.m. and 12:29 p.m. before a delivery at 2:23 p.m. at 6600 Elm Creek Drive, where he reportedly called his supervisor. The report further reflects that appellant continued his route and made several other deliveries before he returned to the office at 4:29 p.m. The report indicates that appellant's schedule was adjusted from his scheduled time. The attached Address Management System Route Listing Report reflected appellant's curb side deliveries. 2001 Deer Run Drive was 7 stops from 1901 Deer Run Drive and 2100 Deer Run Drive was 27 stops from 1901 Deer Run Drive. Five stops after 2011 Deer Run Drive a delivery was made at 6738 Elm Creek Drive, after he reportedly called his supervisor at 6600 Elm Creek Drive.

The record indicates that on May 12, 2015 the employing establishment had authorized emergency treatment for the reported injury *via* a memorandum as it was unable to complete a Form CA-16 authorization for examination and/or treatment, "due to the emergency nature of the visit," prior to appellant's treatment. Medical documentation submitted indicated that appellant was seen at St. David's Emergency Center -- Bastrop on May 12, 2015 and was excused from work from May 12 through 16, 2015. The hospital report was not provided; however, after care instructions were provided for chest wall contusion.

An unsigned attending physician's report (Form CA-20), indicated a date of treatment of May 13, 2015 for a May 12, 2015 injury which occurred when "left ankle buckled stepping out of LLV, falling on right side to driveway. Right chest, shoulder knee pain." An impression of right shoulder pain, right knee, and chest wall contusion was given.

In a May 13, 2015 report, Dr. Augustine R. Battle, a Board-certified internist, reported that appellant had "stepped out of truck and left ankle twisted causing him to lose his balance and fall on his [right] side. Injured [right] arm [right] shoulder [right] knee neck 10:54 a.m.… He drove self to Bastrop St. David ER and x-rays of right chest ribs and shoulder were normal." An assessment of shoulder joint pain, contusion chest wall, and contusion lower leg were given. A May 13, 2015 duty status report (Form CA-17) and a May 13, 2015 form report from Dr. Battle were also provided. In the form report, Dr. Battle advised that appellant had hurt right shoulder, knee, and chest wall on May 12, 2015. He indicated that appellant was temporarily totally disabled from May 13 to 20, 2015. Signed duty status reports (Form CA-17) and office notes from Dr. Battle dated May 20, June 3 and 17, 2015 were also received. The June 17, 2015 report diagnosed appellant with rotator cuff tear/pain to right shoulder and right chest contusion from the May 12, 2015 injury.

OWCP received a copy of a May 21, 2015 modified-duty job offer, which appellant accepted on May 21, 2015.

By decision dated July 9, 2015, OWCP denied appellant's claim, finding that fact of injury had not been established. It found that there was an inconsistency in the evidence as to how the alleged injury occurred.

On August 7, 2015 OWCP received appellant's request for a review of the written record before an OWCP hearing representative. In a July 15, 2015 letter, appellant indicated that he only filed a claim because his condition had deteriorated. He alleged that his supervisor's statement contained many mistakes. Appellant stated that he called his supervisor on May 12, 2015 at approximately 2.00 p.m., not 1:30 p.m. as he stated. He told him that he had fallen and injured his shoulder at 2001 Deer Run. Appellant stated that his supervisor went to investigate the accident and called him five minutes later describing the location. He told his supervisor that he was at the wrong address. Appellant also offered to show him where the accident had occurred, but was told to continue delivering his route as long as he could. When his supervisor asked what time the accident had happened, he replied that he did not remember exactly, but that it had to be between 11:30 a.m. and 12:00 p.m. Appellant again emphasized to him that the injury occurred at 2001 Deer Run, not 2100 as he had written. He stated that little did he know that later down the road, his supervisor would use that correction to make it appear that he was trying to make a false statement. Appellant also asserted that if the MSP scans were used to determine the actual time of injury and/or whether it was in the line of travel, his times put him in the exact location at the time of the accident. For instance, the scan for 1901 Deer Run was hit at 12:01, so that would make his actual time of injury at about 12:03 p.m., closer to his estimated time of injury. Appellant also stated that there were a number of factors that could change the precise line of travel time that an MSP scan was hit, which included Express Mail, delivering miss thrown parcel, DPS mail, *etc.*, but he did not remember if he had any Express Mail that day. Appellant maintained that he was in the performance of duty when he fell and injured himself on May 12, 2015.

On August 13, 2015 OWCP received an undated note from appellant reiterating that the correct address where the injury occurred was 2001 Deer Run. Appellant indicated that his supervisor had indicated in his statement that he went to 2100 Deer Run, but that was not the correct location. He noted that on the attached Form CA-1, his supervisor acknowledged that appellant said the correct address was 2001 Deer Run. However, his supervisor never stated that he went out to investigate 2001 Deer Run.

In a July 30, 2015 report, Dr. Beatrice Taylor, an osteopath and family practitioner, noted the history of the May 12, 2015 injury as a fall onto right shoulder and right knee while delivering mail. "[Appellant] turned his left ankle, lost balance and fell forward. His [right] shoulder/arm/elbow went into his side and he struck his [right] knee." Diagnoses of sprain knee/leg, knee internal derangement, sprain shoulder and rotator cuff tear was provided. Appellant was taken off work until diagnostic testing was completed. Diagnostic testing for the right knee from July 31, 2015 revealed tear of posterior horn lateral meniscus, moderate lateral compartment arthritis, small joint effusion, medial collateral ligament sprain and degenerate joint space narrowing in right medial compartment. In an August 3, 2015 report, Dr. Taylor expanded the diagnoses to include cumulative trauma repetitive impact. Appellant was to remain off work until diagnostic testing of right shoulder completed.

An August 6, 2015 diagnostic test for the right shoulder revealed moderate size full-thickness tear of the entire supraspinatus tendon with mild muscle atrophy, moderate infraspinatus tendinopathy with mild muscle atrophy, and 25 to 50 percent articular-sided partial tear of the subscapularis tendon. Additional medical progress reports, duty status reports, physical therapy reports, diagnostic reports, and requests for authorization were also received.

In a December 24, 2015 letter, the employing establishment asserted that while appellant alleged the injury occurred at 2001 Deer Run at 11:00 a.m., the MSP scans showed he was at 1901 Deer Run at 12:01 p.m. According to the line of travel, appellant's sequence of delivery, 2001 Deer Run was 7 deliveries after where the alleged injury took place and therefore the injury could not have happened at 11:00 a.m. The employing establishment further noted that the statement from appellant's supervisor indicated that appellant could not indicate where the injury occurred, and based on the time appellant indicated, he was not at the place where he stated. Both of the addresses appellant had indicated were after 1901 Deer Run.

In a January 8, 2016 statement, appellant stated that the 11:00 a.m. time of occurrence of the accident was always in question as he had stated from the beginning that he did not take note of the time the accident occurred, it was purely an approximation on his part. He reiterated that the MSP scans could be misleading and he was on his assigned route at the time the injury occurred. Appellant noted that the MSP report indicated that he was at 1901 Deer Run at 12:01 p.m. and that 2001 Deer Run was seven deliveries after, which was true. He reiterated that the 11:00 a.m. time was an approximation on his part and supported by his previous statements that he had told his supervisor that he did not remember the exact time of injury because he was trying to shake the injury off and finish the route. Appellant noted that he specifically told his supervisor when he came to investigate that he could look at the MSP scans if the time had to be exact as he had just scanned a package prior to the accident. He also asserted that he had never wavered from the fact that he had fallen at 2001 Deer Run as he knew exactly where he fell and how. Appellant asserted that he never stated that the injury occurred at 2100 Deer Run and his supervisor should have written his statement sooner rather than later and he would have remembered the facts. He indicated that he previously stated that his supervisor was at the wrong address to begin with and that he wanted to show him exactly where the accident occurred, but was told to keep delivering the mail.

By decision dated January 12, 2016, an OWCP hearing representative affirmed the denial of appellant's claim as the factual portion of fact of injury had not been established due to the factual inconsistencies in his own statements.

On August 15, 2016 appellant, through counsel, requested reconsideration.[5] Duplicate copies of evidence already of record were received, along with new evidence. The new evidence included an October 12, 2015 hospital laboratory report.

In an April 25, 2016 form report, Dr. Battle noted that as appellant stepped out of his truck his left ankle twisted, which caused him to lose balance and fall on his right side. This caused injury to his right knee and neck. He indicated that appellant's conditions of shoulder joint pain, contusion chest wall, and contusion lower leg were causally related to the work injury.

[5] On March 30, 2016 appellant, through counsel, appealed to the Board. The Board issued an order on August 8, 2016 dismissing the appeal at his request. Docket No. 16-0931 (issued August 8, 2016).

In an April 25, 2016 form report, Dr. Benjamin Amin[6] related that appellant stepped out of truck at work last May and fell onto right shoulder. He diagnosed a right full-thickness rotator cuff tear which he opined was causally related to the facts of injury.

By decision dated September 27, 2016, OWCP denied modification of its January 12, 2016 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[7] 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 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 are causally related to the employment injury.[8] 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.[9]

To determine whether an employee actually sustained an injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.[10] 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, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.[11] 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.[12] 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 in determining whether a case has been established.[13] However, an

[6] Dr. Amin's medical credentials could not be confirmed.

[7] *Supra* note 2.

[8] *Gary J. Watling*, 52 ECAB 278 (2001); *Elaine Pendleton*, 40 ECAB 1143, 1154 (1989).

[9] *Michael E. Smith*, 50 ECAB 313 (1999).

[10] *Elaine Pendleton, supra* note 8.

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

[12] *Id.*

[13] *Linda S. Christian*, 46 ECAB 598 (1995).

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.[14]

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence. When an employee claims that he or she sustained an injury in the performance of duty he or she must submit sufficient evidence to establish that he or she experienced a specific event, incident, or exposure occurring at the time, place, and in the manner alleged. He or she must also establish that such event, incident, or exposure caused an injury.[15] Once an employee establishes that he or she sustained an injury in the performance of duty, he or she has the burden of proof to establish that any subsequent medical condition or disability from work, for which he or she claims compensation is causally related to the accepted injury.[16]

ANALYSIS

The Board finds that the case is not in posture for decision.

On May 12, 2015 appellant filed a claim for a traumatic injury alleging that on that day he injured his right side, shoulder and knee while delivering mail in the performance of duty. He indicated that the injury occurred at 11:00 a.m. on 2001 Deer Run when he had turned his ankle and fell forward. The employing establishment controverted the claim as there were conflicting statements as to whether the injury occurred at the time and place alleged. Specifically, it noted that appellant's supervisor indicated that the injury occurred at 2100 Deer Run while appellant indicated that it occurred at 2001 Deer Run. The employing establishment also noted that appellant's MSP scans on May 12, 2015 put him on Deer Run approximately an hour after the alleged 11:00 a.m. injury occurred. OWCP determined that appellant had not factually established his traumatic injury claim.

The Board, however, finds that the evidence does not contain inconsistencies sufficient to cast doubt on appellant's version of the occurrence of the employment incident. Appellant has constantly maintained in all of his statements that the injury occurred at 2001 Deer Run. He has also described in significant detail the address and the physical layout of the premises where he claimed the injury occurred. In his July 15, 2015 letter, he explained that he had called his supervisor on May 12, 2015 at approximately 2.00 p.m. and told him that he had fallen and injured his shoulder at 2001 Deer Run. Appellant stated that his supervisor went to investigate the accident at 2100 Deer Run and that he had told his supervisor that he was at the wrong address. He stated that he had offered to show him where the incident occurred, but was told to continue delivering his route as long as he could.

[14] *Gregory J. Reser*, 57 ECAB 277 (2005).

[15] *See generally John J. Carlone*, 41 ECAB 354 (1989); *see also* 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. § 10.5(q) and (ee) (1999) (occupational disease or illness and traumatic injury defined). *See Victor J. Woodhams*, 41 ECAB 345 (1989) regarding a claimant's burden of proof in an occupational disease claim.

[16] *Supra* note 5.

The CA-1 form which was signed and completed on May 12, 2015 by both appellant and his supervisor related that the place where the injury occurred was corrected to 2001 Deer Run. Additionally, the last page of the CA-1 form clearly notes that the injury occurred on May 12, 2015 at 2001 Deer Run and was signed by appellant's supervisor. Therefore the evidence of record does not contradict appellant's statement as to the location of the employment incident.

As to when the employment incident occurred, appellant has maintained that the 11:00 a.m. time on the CA-1 form was an approximate time. The employing establishment asserted that MSP put appellant at 2001 Deer Run after 12:01 p.m., and appellant subsequently agreed in his January 8, 2016 statement. The Board finds that this is consistent with appellant's version of events and his actions. In his June 2, 2015 statement, appellant explained that, after the work incident, he had continued his deliveries "trying to shake off the pain." He indicated that he called his supervisor when he arrived at 6600 Elm Creek as his pain grew continually worse. In his July 15, 2015 letter, appellant advised that when his supervisor asked what time the accident occurred, he replied that he did not remember exactly, but that it had to be between 11:30 a.m. and 12:00 p.m. Appellant's May 12, 2015 MSP Carrier Report indicated that he had made a delivery at 1901 Deer Run Drive at 12:01 p.m., 2001 Deer Run, the place where the incident occurred, was after 1901 Deer Run Drive. Consistent with his statement that he had continued his deliveries while "trying to shake off the pain," the MSP report indicates that appellant had made two other scanned deliveries before a 2:23 p.m. delivery at 6600 Elm Creek Drive, where he indicated he called his supervisor. The MSP report further reflects that appellant continued his route and made several other deliveries before he returned to the office at 4:29 p.m. Appellant has maintained that he did not deviate from his duties that day and there is no evidence that he had deviated from his route.

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.[17] Under the circumstances of this case, the Board finds appellant's allegations have not been refuted by strong or persuasive evidence. The Board, therefore, finds that the evidence of record is sufficient to establish that the May 12, 2015 incident occurred at the time, place, and in the manner alleged.

The Board will remand the case for OWCP to determine whether appellant sustained an injury causally related to the May 12, 2015 employment incident.[18] Following this and other such further development as deemed necessary, it shall issue a *de novo* decision.[19]

[17] *T.S.*, Docket No. 15-0930 (issued March 1, 2016); *Gregory J. Reser*, 57 ECAB 277 (2005).

[18] *See supra* note 11.

[19] The record indicates that on May 12, 2015 the employing establishment had authorized emergency treatment for the reported injury *via* a memorandum as it was unable to complete a Form CA-16 authorization for examination and/or treatment, "due to the emergency nature of the visit," prior to appellant's treatment. The employing establishment indicated that "upon return to the office and submission of a claim for benefits" they would complete a Form CA-16 and provide a copy to the hospital billing office. The Board notes that the case record does not contain a properly executed Form CA-16. Upon return of the case record, OWCP should inquire as to the existence of a Form CA-16.

CONCLUSION

The Board finds that appellant has established that the May 12, 2015 employment incident occurred at the time, place, and in the manner alleged. The Board further finds that the case is not in posture for decision as to whether appellant sustained an injury causally related to the accepted employment incident. On remand OWCP will consider the medical evidence and issue a *de novo* decision on the issue.

ORDER

IT IS HEREBY ORDERED THAT the September 27, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: June 8, 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