

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

_____)	
H.H., Appellant)	
)	
and)	Docket No. 18-0177
)	Issued: May 17, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
Miami, FL, Employer)	
_____)	

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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On October 30, 2017 appellant, through counsel, filed a timely appeal from a June 19, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3(c), 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 her burden of proof to establish a right foot injury in the performance of duty on March 16, 2016.

FACTUAL HISTORY

On April 1, 2016 appellant, then a 60-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that, on March 16, 2016, coworker C.G. approached her to retrieve work that she had not yet completed.³ When she informed C.G. that she was not yet finished and arose to get more work, C.G. deliberately stepped on appellant's right great toe. Appellant then "push[ed] C.G. She provided a scanned copy of a March 30, 2016 duty status report (Form CA-17) signed by Dr. Marie Williams, an attending podiatrist, restricting appellant from work.

On April 11, 2016 the employing establishment issued appellant a notice of removal as she violated the "Zero Tolerance Policy for violence in the workplace." Appellant was placed in an unpaid, emergency leave status.

In a statement dated April 14, 2016, C.R., an employing establishment supervisor, controverted the claim, contending that the claimed injury was caused by appellant's willful misconduct. C.R. contended that appellant "was angered by another employee picking up a tray with labels. [Appellant] proceeded to push the employee on the back, violating the [employing establishment] [Z]ero [T]olerance [P]olicy." C.R. also alleged that appellant's statement did "not correspond to the two witness statements and the investigating interview.

In a letter dated April 14, 2016, an employing establishment manager controverted appellant's claim. She explained that at the time of the claimed injury, appellant had been on modified duty due to a May 3, 2008 injury accepted under OWCP File No. xxxxxx960. The manager alleged that on March 16, 2016 appellant confronted and pushed C.G.

By development letter dated April 21, 2016, OWCP notified appellant of the additional evidence needed to establish her traumatic injury claim, including factual evidence in corroboration of her allegation that C.G. stepped on her feet, and a well-reasoned medical opinion from her attending physician which established a medical diagnosis causally related to the March 16, 2016 employment incident. It also requested that appellant respond to an attached development questionnaire in order to substantiate the factual elements of her claim. Appellant was afforded 30 days to submit the additional evidence. A similar letter was sent to the employing establishment.

In response, appellant provided statements dated May 3, 2016, alleging that C.G. deliberately stepped on her feet to aggravate a prior injury, and that she pushed C.G. only to get her off her feet.

³ On May 18, 2016 appellant claimed wage-loss compensation (Form CA-7) for total disability from May 14 to June 3, 2016. By development letter dated May 19, 2016, OWCP noted that her claim for wage-loss compensation would not be reviewed unless her traumatic injury claim was accepted.

The employing establishment submitted an incident report and witness statements dated March 16, 2016. Appellant alleged that, when she reached for a container of unfinished work that C.G. had removed from her desk, C.G. deliberately stepped on her feet and appellant pushed her off. In her statement, C.G. alleged that, while collecting work trays from various employees, appellant approached her from behind. She turned to face appellant, who “was so close her stomach was pressing against me, touching me.” Appellant allegedly yelled at and threatened C.G., then “swatted” her and “shov[ed] her in the back while [C.G.] had her hands up in the air.”⁴ Coworker H.W. asserted that when C.G. collected tabs from appellant’s work area, appellant told C.G. to leave them, then “walked over and tried to take the tray from [C.G.]. [C.G.] lifted the tray high above her head so [appellant] would n[o]t reach. There was a commotion and as [C.G.] turned to walk away, [appellant] pushed her slightly on her back.” Coworker R.D. recalled that she saw appellant trying to “get a small tray that [C.G.] had in her hands.” When C.G. turned away from appellant, appellant pushed C.G. on the back.

On May 10, 2016 the employing establishment reinstated appellant pursuant to a settlement agreement.

Appellant also submitted additional reports from Dr. Williams. In reports dated March 30 and April 12, 2016, Dr. Williams noted swelling and bruising in the toes of both feet, greater on the left, without a history of new trauma. She related appellant’s account of another employee stepping on her “right great toe and joint” during an altercation. Dr. Williams diagnosed peripheral vascular disease, bilateral ankle and foot pain, and a contusion of the right great toe. She held appellant off work. In an attending physician’s report (Form CA-20) dated April 12, 2016, Dr. Williams noted that appellant had a contusion of the right foot demonstrable by x-ray. She checked a box marked “yes” supporting causal relationship between a coworker stepping on appellant’s foot on March 16, 2016 and the diagnosed contusion. Dr. Williams prescribed physical therapy. In a report dated April 28, 2016, she held appellant off work due to increased pain and swelling of the right foot. Dr. Williams administered an injection and applied strapping. She opined that appellant’s “injury was solely caused by being stepped on at work on March 16, 2016.” Dr. Williams held appellant off work through May 11, 2016.

Appellant also provided a set of eight photographs taken on or before April 10, 2016. Four photographs are of her right foot, showing the right great toe. Three photographs are of an unidentified medical provider applying two layers of material to the right foot and right great toe, and the remaining photographs showed appellant’s right foot wrapped with two layers of material.

By decision dated May 24, 2016, OWCP denied the claim, finding that fact of injury had not been established. It found that the factual inconsistencies between appellant’s account of events and the witness statements cast serious doubt on the validity of her claim. OWCP noted that she delayed seeking medical treatment for two weeks. Additionally, it found that Dr. Williams provided inconsistent accounts of the mechanism of injury and that appellant waited almost a month to report the injury.

⁴ On its face, C.G.’s statement is dated March 15, 2016. As the body of the statement describes the alleged March 16, 2016 incident, the March 15, 2016 date appears to be a harmless clerical error.

On June 3, 2016 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative, which was held on February 16, 2017.

During the hearing, appellant alleged that on March 16, 2016 she and C.G. had processed different sections of international mail tags. C.G. grabbed a tray of uncompleted tags from appellant's workstation. Appellant attempted to retrieve them, but C.G. held the tray above her head and stomped on appellant's right foot. She explained that when she reached for the tray, C.G. lifted the tray above her head, turned her back toward appellant and then stepped backwards onto appellant's feet. Appellant explained that she delayed seeking medical treatment for the claimed injury because she could not get an earlier appointment with Dr. Williams, who was then treating her for bilateral plantar fibromatosis, and did not want to risk incurring expenses for emergency treatment. In March 2016, she participated in physical therapy three times a week for plantar fasciitis.⁵ Appellant acknowledged that she and C.G. had prior interpersonal difficulties as C.G. "talked down" to people during training, but that she had no relationship with C.G. outside of work.

In a report dated October 10, 2016, Dr. Williams noted appellant's complaints of continued pain in the right great toe and right foot. On examination, the toes of both feet were swollen and painful to palpation, with swelling, bruising, and restricted motion of the first right metatarsophalangeal joint. Dr. Williams diagnosed a contusion of the right great toe and an unspecified enthesopathy of the right foot. She applied Kinesiotape strapping and prescribed medication. Dr. Williams held appellant off work.

In a questionnaire dated October 10, 2016, Dr. Williams asserted that on March 16, 2016 C.G. went to appellant's desk "to get paperwork without consent. [Appellant] told [C.G.] to put the paperwork back and [C.G.] did not. [She] stood up and [C.G.] stepped on her toe."

In an attending physician's report (Form OWCP-20) dated November 21, 2016, Dr. Williams noted that appellant had undergone bilateral plantar fascial release. She diagnosed chronic plantar fascial fibromatosis caused by prolonged walking, standing, and climbing stairs at work.

By decision dated June 19, 2017, the hearing representative affirmed OWCP's May 24, 2016 decision, finding that the evidence of record failed to establish fact of injury. The hearing representative found that appellant provided multiple accounts of the alleged March 16, 2016 incident, none of which were corroborated by witness statements. Although the factual evidence of record supported a March 16, 2016 encounter between appellant and C.G., none of the witnesses saw C.G. step on appellant's foot. The hearing representative further found that appellant did not provide an adequate explanation as to why she delayed seeking medical treatment for two weeks following the claimed injury.

⁵ Appellant submitted physical therapy appointment slips dated March 2 to 30, 2016.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁶ 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 of FECA, that an injury was sustained in the performance of duty as alleged, and that any specific condition or disability for which compensation is claimed is causally related to the employment injury.⁷

To determine whether an employee sustained a traumatic 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 that must be considered conjunctively. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident that is alleged to have occurred.⁸ 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.⁹

OWCP cannot accept fact of injury if there are such inconsistencies in the evidence as to seriously question whether the specific event or incident occurred at the time and place, and in the manner alleged, or whether the alleged injury was in the performance of duty,¹⁰ nor can OWCP find fact of injury if the evidence of record fails to establish that the employee sustained an “injury” within the meaning of FECA. 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.¹¹ 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 cast doubt on an employee’s statements in determining whether he or she has established the claim.¹²

ANALYSIS

The Board finds that appellant has not established that she sustained a right foot injury on March 16, 2016 in the performance of duty.

⁶ *Supra* note 2.

⁷ *J.F.*, Docket No. 09-1061 (issued November 17, 2009).

⁸ *Gary J. Watling*, 52 ECAB 278 (2001).

⁹ *Deborah L. Beatty*, 54 ECAB 340 (2003).

¹⁰ *A.S.*, Docket No. 16-0735 (issued November 3, 2016); *Elaine Pendleton*, 40 ECAB 1143 (1989).

¹¹ *See Gene A. McCracken*, Docket No. 93-2227 (issued March 9, 1995); *Joseph H. Surgener*, 42 ECAB 541, 547 (1991).

¹² *A.S.*, *supra* note 10. *See Constance G. Patterson*, 42 ECAB 206 (1989).

Appellant asserted on her April 1, 2016 Form CA-1 and in a May 3, 2016 statement that, on March 16, 2016, coworker C.G. deliberately stepped on her right great toe while holding a tray of appellant's work above her head, and that she pushed C.G. to get her off her right foot. In her March 16, 2016 statement, C.G. acknowledged that, while she held her hands above her head, she was in very close proximity to appellant such that appellant's abdomen was in contact with C.G.'s person. However, C.G. alleged that appellant "swatted" and "shoved her" for no reason, and C.G. did not mention whether she stepped on appellant's foot. Coworker H.W.'s March 16, 2016 statement corroborated that C.G. held a tray above appellant's head, and that as C.G. turned to walk away, appellant "pushed [C.G.] slightly on her back." Similarly, coworker R.D. asserted in a March 16, 2016 statement that C.G. had a small tray in her hands that appellant wanted, and that, when C.G. turned away, appellant pushed her on the back.

The factual evidence thus supports an encounter between appellant and C.G. on March 16, 2016, that the two were in very close physical proximity, and that C.G. held a tray of appellant's work above her head. However, there is insufficient factual evidence that C.G. also stepped on appellant's right foot, whether accidentally or deliberately. C.G. did not directly address this aspect of appellant's allegations, and witnesses H.W. and R.D. did not relate that C.G. stepped on appellant's foot. Therefore, the Board finds that the factual evidence of record is insufficient to establish that C.G. stepped on appellant's foot as alleged.¹³

In addition to the lack of direct factual corroboration, appellant did not seek medical attention for the claimed injury until her March 30, 2016 with Dr. Williams, an attending podiatrist. She asserted at a February 16, 2017 hearing that she delayed seeking treatment as she did not wish to incur the financial expenses of emergency treatment. Also, appellant preferred to wait to see Dr. Williams, who was then treating her for bilateral plantar fibromatosis. Although she participated in physical therapy throughout March 2016 to treat plantar fibromatosis, she did not provide probative medical evidence dated prior to March 30, 2016 documenting the presence of a new traumatic right foot injury. The lack of contemporaneous medical evidence casts doubt on the validity of the claim.¹⁴

By development letter dated April 21, 2016, OWCP requested that appellant submit additional factual and medical evidence explaining how she sustained an injury to her right foot on the date in question. Appellant failed to submit such evidence. Therefore, the Board finds that there is insufficient evidence of record to meet her burden of proof to establish that she sustained an injury in the performance of duty, as 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.

¹³ A.S., *supra* note 10.

¹⁴ *Constance G. Patterson*, *supra* note 12.

¹⁵ *Supra* note 10.

On appeal counsel contends that OWCP “failed to adjudicate the claim in accordance with standard of causation,” that there was an unresolved conflict of medical evidence, and that OWCP failed “to give due diligence to the findings of the attending physician” and requested that the Board specify any defects in medical rationale. As set forth above, OWCP properly denied the claim based on a lack of factual evidence. As appellant failed to meet the threshold issue of fact of injury, the medical evidence is no longer dispositive in the case.

The Board notes that there is no conflict of medical evidence in the case under 5 U.S.C. § 8123 as OWCP did not obtain a second opinion or direct a review by an OWCP medical adviser.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish a right foot injury in the performance of duty on March 16, 2016.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers’ Compensation Programs dated June 19, 2017 is affirmed.

Issued: May 17, 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