United States Department of Labor
Employees' Compensation Appeals Board

B.S., Appellant	)	
and	)	**Docket No. 19-0524**
	)	**Issued: August 8, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Kansas City, KS, Employer	)	

Appearances:
Appellant, pro se
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 April 1, 2019 appellant filed a timely appeal from an October 5, 2018 merit decision and a November 16, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish an injury in the performance of duty on August 8, 2018, as alleged; and (2) whether OWCP properly denied appellant's request for an oral hearing before an OWCP hearing representative as untimely filed pursuant to 5 U.S.C. § 8124(b).

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the October 5, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

FACTUAL HISTORY

On August 8, 2018 appellant, then a 54-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) alleging that on that date she sustained a right knee injury while in the performance of duty. She described the incident as "barrier post across from towline." Appellant notified her supervisor, stopped work, and sought medical treatment on the date of the incident. On the reverse side of the claim form appellant's supervisor indicated that appellant was in the performance of duty when she reached out to catch herself by grabbing a maintenance bike and the bike moved as she tried to break her fall. She responded, "yes" when asked if she agreed with appellant's statements surrounding the incident.

In an August 8, 2018 witness statement, E.G., appellant's coworker, reported that on that same date she witnessed appellant fall. She stated that appellant tried to catch her balance and fell into a maintenance bike, causing her to hit the floor.

On August 8, 2018 the employing establishment executed an OWCP authorization for examination and/or treatment (Form CA-16) authorizing appellant to obtain treatment for her right knee injury at a medical facility. Hospital discharge instructions dated August 8, 2018 were provided for a right patella fracture.

In an August 9, 2018 medical report, Dr. Cong Zhao, Board-certified in occupational medicine, reported that on August 8, 2018 appellant tripped over a two-foot barrier at work and landed on her right knee. Appellant reported seeking emergency medical treatment on the date of the incident and was informed that she sustained a right kneecap fracture following an x-ray of the right knee. Dr. Zhao reviewed the ER x-ray and noted that it did not reveal acute bony abnormalities. He diagnosed right knee injury and contusion of right knee. In reports dated August 8, 9, and 13, 2018, Dr. Zhao provided restrictions of no driving, squatting, kneeling, climbing stairs, and walking on uneven terrain.

By development letter dated August 23, 2018, OWCP advised appellant that the evidence of record was insufficient to establish her claim. It further advised her of the factual and medical evidence necessary to establish her claim and provided a questionnaire for completion. OWCP afforded appellant 30 days to provide the necessary information.

In support of her claim, appellant submitted an August 13, 2018 medical report from Dr. Ronda Warren, Board-certified in family medicine, who discussed the August 8, 2018 employment incident of appellant tripping over a barrier and falling on her right knee at work. Dr. Warren noted that appellant's ER records revealed a right knee patellar fracture, although a copy of the x-ray report was still pending. She diagnosed right knee contusion and right patellar fracture. An August 28, 2018 consultation report and September 14, 2018 right knee x-ray study were also submitted.

By decision dated October 5, 2018, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish that the August 8, 2018 employment incident occurred as alleged. It noted that she had not responded to the August 23, 2018 questionnaire and, therefore, had not substantiated the factual element of her claim. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

OWCP subsequently received an August 8, 2018 right knee x-ray report and work restrictions dated October 4, 2018.

On November 2, 2018 appellant responded to OWCP's August 23, 2018 development questionnaire and described the circumstances surrounding the claimed August 8, 2018 employment incident. She noted no prior injuries to her knees and no history of falling.

In an undated appeal request form received on November 13, 2018, appellant requested an oral hearing before an OWCP hearing representative.

By decision dated November 16, 2018, OWCP denied appellant's request for an oral hearing before an OWCP hearing representative, finding that she was not entitled to a hearing as a matter of right because her request was not made within 30 days of the issuance of its October 5, 2018 decision. It exercised its discretion and determined that the issue in the case could equally well be addressed by requesting reconsideration and submitting evidence not previously considered which established that she sustained an injury.

LEGAL PRECEDENT -- ISSUE 1

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 of FECA,[4] that an injury was sustained in the performance of duty, as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.[5] These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[6]

To determine if an employee sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established.[7] Generally, fact of injury consists of two components that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that allegedly occurred.[8] The second component is whether the employment incident caused a personal injury.[9]

[3] *Id.*

[4] *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

[5] *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[6] *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[7] *D.B.*, Docket No. 18-1348 (issued January 4, 2019); *T.H.*, 59 ECAB 388, 393-94 (2008).

[8] *D.S.*, Docket No. 17-1422 (issued November 9, 2017); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[9] *B.M.*, Docket No. 17-0796 (issued July 5, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

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.[10] Moreover, 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 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]

ANALYSIS -- ISSUE 1

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

On her CA-1 claim form appellant indicated that she sustained a right knee injury on August 8, 2018 due to a "barrier post across from towline." On the reverse side of the claim form appellant's supervisor indicated that her injury occurred in the performance of duty. She explained that appellant reached out to catch herself from falling, she grabbed a maintenance bike, but the bike moved as she attempted to break her fall. Appellant's supervisor also responded "yes" to the question of whether her knowledge of the facts about the injury was in agreement with statements of the employee and/or witnesses.

E.G., a witness to the incident, provided an August 8, 2018 statement indicating that she witnessed appellant's fall. She explained that appellant attempted to catch herself, but she fell into a maintenance bike, and hit the floor.

The Board finds that, while appellant vaguely described her injury on the Form CA-1 in workplace jargon, the description of the alleged incident from appellant's supervisor and the August 8, 2018 witness statement from E.G. are sufficient to establish that the August 8, 2018 employment incident occurred at the time, place, and in the manner alleged. These statements provided a single account of the mechanism of injury that has not been refuted by any evidence in the record.[13] Medical evidence of record also substantiated appellant's description of the August 8, 2018 incident. Appellant was treated on August 8, 2018 for a right knee injury. Subsequently, on August 9, 2018 Dr. Zhao reported a history of injury that on August 8, 2018 appellant tripped over a two-foot barrier at work and landed on her right knee. Dr. Warren related the same history of injury in her August 13, 2018 report. As noted above, a claimant's statement that an injury occurred at a given time, place, and in a given manner is of great probative value and will stand

[10] *A.C.*, Docket No. 18-1567 (issued April 9, 2019); *D.B.*, 58 ECAB 529 (2007); *Gregory J. Reser*, 57 ECAB 277 (2005).

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

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

[13] *See S.W.*, Docket No. 17-0261 (issued May 24, 2017) (the Board found that appellant had established that the employment incident occurred as alleged when appellant provided consistent accounts of the claimed incident and there was no evidence to refute her detailed description); *see also J.L.*, Docket No. 17-1712 (issued February 12, 2018).

unless refuted by strong or persuasive evidence.[14] The Board finds, therefore, that appellant has established that the August 8, 2018 employment incident occurred in the performance of duty, as alleged.

As appellant has established that the August 8, 2018 employment incident factually occurred, the question becomes whether this incident caused an injury.[15] The Board will, therefore, set aside OWCP's October 5, and November 16, 2018 decisions and remand the case for consideration of the medical evidence. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision addressing whether appellant has met her burden of proof to establish a diagnosed medical condition causally related to the accepted employment incident and any attendant disability.[16]

CONCLUSION

The Board finds that this case is not in posture for decision.[17]

[14] *Supra* note 10.

[15] *See Willie J. Clements*, 43 ECAB 244 (1991).

[16] The Board notes that the employing establishment issued an authorization for examination and/or treatment (Form CA-16). A completed Form CA-16 authorization may constitute a contract for payment of medical expenses to a medical facility or physician, when properly executed. The form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. *See* 20 C.F.R. § 10.300(c); *J.G.*, Docket No. 17-1062 (issued February 13, 2018); *Tracy P. Spillane*, 54 ECAB 608 (2003).

[17] In light of the Board's disposition in Issue 1, Issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated November 16 and October 5, 2018 are set aside and this case is remanded for further proceedings consistent with this decision.

Issued: August 8, 2019
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