United States Department of Labor
Employees' Compensation Appeals Board

D.L., Appellant	)	
and	)	**Docket No. 18-1189**
	)	**Issued: February 15, 2019**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Orlando, 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:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 21, 2018 appellant, through counsel, filed a timely appeal from an April 26, 2018 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.[3]

[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.*

[3] The Board notes that following the April 26, 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 evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met his burden of proof to establish a December 30, 2015 traumatic injury in the performance of duty, as alleged.

FACTUAL HISTORY

On January 25, 2016 appellant, then a 47-year-old housekeeping aid, filed a traumatic injury claim (Form CA-1) alleging that, on December 30, 2015, he injured his right ankle in the performance of duty. He explained that he was pulling a large trash bin when a coworker played around, pulled the bin, and (unbeknownst to him) placed his body weight on the container. Appellant related that he heard a pop as he pulled the bin. He noted that he experienced severe pain in the right ankle that worsened with activity. R.W., appellant's supervisor, noted on the reverse side of the claim form that he did not have knowledge of the alleged injury until 25 days later. He also noted that appellant had not identified the other employee allegedly involved.

OWCP received January 21, 2016 x-rays of appellant's right ankle, tibia, and fibula, read by Dr. Jeffrey D. Kurzon, a Board-certified diagnostic radiologist, who found no acute fracture or dislocation. Dr. Kurzon also found evidence of old trauma to the ankle, a small effusion, and degenerative joint disease.

An April 21, 2016 employing establishment report of emergency treatment related that appellant should be seen by an orthopedic surgeon for his right ankle condition, as soon as possible.

By development letter dated June 1, 2016, OWCP advised appellant of the deficiencies in his claim. It explained that the factual evidence was insufficient to establish that he experienced the employment incident as alleged. OWCP also indicated that appellant had not provided a physician's opinion as to how the alleged incident resulted in the diagnosed right lower extremity conditions. It provided appellant a factual questionnaire for his completion and afforded him 30 days to submit the necessary evidence.

In a July 1, 2016 response, appellant indicated that, on December 30, 2015, he was emptying a large bin, and when he tugged at the bin, he was unable to move it. He explained that he grabbed the bin with both hands, tugged, and felt a pop and a sharp pain in his right ankle, he lost his balance, but then quickly readjusted his stance. Appellant related that M.H., a coworker, then "raised up" behind the bin laughing. He noted that he informed the coworker that "he just made my gout [flare] up in my ankle as I heard it pop." Appellant also alleged that the coworker thereafter inappropriately touched him, claiming he was sorry.

Appellant related that he delayed filing the claim because he had only been on the job for approximately two weeks and he did not want to be fired. He was also ashamed having been touched inappropriately, and he did not report the incident until his condition reached a point where he could not sleep or concentrate due to the pain. Appellant noted that he had a prior ankle condition and indicated that, when he was treated at the emergency room, it was confirmed that his current ankle condition was not a flare up of his gout, nor was it arthritis, but rather, it was a new injury to his ankle. He explained that he was told to report his injury to his employer. Appellant noted that when he informed his immediate supervisor, R.W., he was in disbelief and asked the name of the other individual involved. He noted that he was unsure of his name, but explained that it was the individual assigned to work the clinic with him. Appellant also explained

that the employee did something to him as well, but that he was ashamed to tell R.W. that he had been inappropriately touched. He confirmed that there was no one else in the vicinity at the time. Appellant also indicated that he requested that R.W. pull the video evidence, but he was unsure if that was ever done.

OWCP received reports dated May 1, June 14, and July 12, 2016 from Dr. William P. McLeod, an orthopedic surgeon. In his May 1, 2016 report, Dr. McLeod referred to an October 28, 2015 accident during which appellant was backing his rental car into his driveway when his vehicle was struck by another vehicle. He noted that appellant had pain in his cervical, thoracic, and lumbar spine, as well as pain in both ankles, especially on the right. Dr. McLeod explained that on December 30, 2015, appellant injured his right ankle and he was seen in the emergency room. He saw appellant again on June 14, 2016 for complaints of neck, back, scapular, and right ankle pain. Dr. McLeod explained that appellant was in follow up from an accident of October 28, 2015.

OWCP also received a June 28, 2016 nurse's note. The nurse indicated that appellant was seen for reevaluation of right ankle pain that occurred on December 30, 2015.

By decision dated August 25, 2016, OWCP denied appellant's claim. It found that the factual component of fact of injury had not been established. OWCP explained that appellant had not established that the alleged incident occurred at the time, place, or in the manner alleged. It also found that the medical evidence did not include a consistent history of how he injured his right ankle as a result of employment factors which he alleged had caused his injury. OWCP specifically noted that Dr. McLeod did not mention any employment factor from his injury on December 30, 2015 in his report of May 10, 2016, but rather discussed his motor vehicle accident from 2015.

On September 20, 2016 appellant requested a telephonic hearing before an OWCP hearing representative, which was held on April 19, 2016. During the hearing, he noted that he had gout and degenerative joint disease in his right foot prior to the alleged employment injury. Appellant stated that he had also received a settlement due to a motor vehicle accident which involved his right ankle.[4] He also testified that he told Dr. McLeod that the automobile accident, which occurred in October 2015 and the employment injury, were two separate incidents, but Dr. McLeod grouped the incidents together. Appellant noted that he delayed reporting the injury because he thought it was from his gout or a flare up of his degenerative joint disease. He also reiterated that he was only on the job for two weeks, so he did not want to be terminated for being unable to perform his duties, as he needed his job. Appellant explained that he finally went to the hospital on January 16, 2016 because he could not sleep or walk because of excruciating pain.

OWCP also received medical reports dated September 19, October 17, November 15, and December 13, 2016, and January 10, February 7, March 7, April 4, and May 2 and 30, 2017 from Dr. Robert R. Reppy, a general practitioner. Dr. Reppy noted that appellant's injury occurred while appellant was working in housekeeping when he was pulling on a large wheeled bin while a co-worker, unbeknownst to him, was playing a joke on him by pulling against him. He explained that appellant related that he gave it a big "yank" and he felt a "pop" in his right ankle, with immediate pain, which grew progressively worse over the next several days. Dr. Reppy noted that appellant explained that he was on a new job and afraid to seek medical attention, and he kept

[4] During the hearing, counsel indicated the accident was in October 2015 and appellant indicated he was not sure, but thought it was in October 2013.

going to work bearing weight on it, when he should not have done so. He diagnosed osteochondritis dessicans of the talus on the right foot. Dr. Reppy continued to treat appellant.

By decision dated June 21, 2017, OWCP's hearing representative affirmed the prior decision. She found that appellant had continued to work and delayed seeking medical treatment, therefore the inconsistencies in the evidence were sufficient to cast doubt that the employment incident had occurred as alleged.

On February 9, 2018 appellant, through counsel, requested reconsideration.[5] Counsel specifically requested that OWCP review the December 21, 2017 report of Dr. Reppy.

In a December 21, 2017 report, Dr. Reppy explained that the injury occurred while appellant was working in housekeeping pulling a large wheeled bin, a coworker, (unbeknownst to him), was playing a joke on him by pulling against him. In frustration, appellant gave a big yank and felt a "pop" in his right ankle, with immediate pain. Dr. Reppy related that appellant indicated that the pain progressively worsened over the next few days and because he was new on the job, he hesitated to seek medical attention. He noted that appellant continued to work and placed weight on the ankle, when he should not have done so. Dr. Reppy opined that the incident of December 30, 2015 "within a reasonable degree of certainty was the direct and proximate cause of appellant's osteochondritis dessicans and displaced discs diagnoses and conditions."

By decision dated April 26, 2018, OWCP denied modification of the June 21, 2017 decision. It found that appellant had not established that the December 30, 2015 employment incident occurred as alleged.

LEGAL PRECEDENT

An employee seeking benefits under FECA 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,[6] and 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.[7] 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.[8]

[5] In a letter dated August 29, 2017, counsel filed an appeal to the Board. In a letter dated January 26, 2018, he requested a dismissal. The Board granted that requested dismissal. *Order Dismissing Appeal*, Docket No. 17-1839 (issued February 8, 2018).

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

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

[8] *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).

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. 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.[9] 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.[10]

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, but the employee's statements must be consistent with the surrounding facts and circumstances and his subsequent course of action. The employee has not met his 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 serious doubt on an employee's statements 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.[11]

ANALYSIS

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

OWCP denied appellant's claim, finding that he had "very inconsistent behavior at the time of [the] alleged injury such as filing [his] claim late as well as seeking delayed medical attention." It found that he delayed advising his supervisor of his injury, delayed filing his claim, delayed seeking medical treatment, and had a preexisting injury to the same ankle and therefore had not met his burden of proof to establish fact of injury.

The Board, however, finds that the evidence of record is sufficient to establish that the employment incident occurred on December 30, 2015, as alleged. There are no sufficient discrepancies, or "very inconsistent behavior," in the case record regarding appellant's claimed December 30, 2015 employment incident so as to cast serious doubt on the fact that it had occurred on that date in the manner alleged.[12] Appellant's claim of a December 30, 2015 employment incident has not been refuted by strong or persuasive evidence.[13] He acknowledged his preexisting

[9] *M.M.*, Docket No. 17-1522 (issued April 25, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

[10] *J.N.*, Docket No. 18-0675 (issued December 10, 2018); *E.H.*, Docket No. 16-1786 (issued January 30, 2017).

[11] *M.J.*, Docket No. 17-1810 (issued August 3, 2018); *S.P.*, Docket No. 10-0431 (issued November 24, 2010); *Mary Joan Coppolino*, 43 ECAB 988, 991 (1992).

[12] *See C.S.*, Docket No. 08-1585 (issued March 3, 2009).

[13] *Id*.

right ankle condition, but the mere existence of a preexisting condition is not a basis for denying fact of injury.[14]

The Board finds that appellant's delay in notifying his supervisor and filing his traumatic injury claim form (Form CA-1) does not cast such inconsistencies as to doubt that the incident occurred at the time, place, and in the manner alleged.[15] While OWCP found his delays sufficient to deny fact of injury, there is no requirement that a claim be filed on the date of injury.[16] In cases of injury on or after September 7, 1974, section 8122(a) of FECA provides that an original claim for compensation for disability or death must be filed within three years after the injury or death.[17]

The Board finds that appellant has consistently reported, in detail, the mechanism of injury due to tugging on a bin which was being held onto by M.H, his coworker, unbeknownst to him. He has been consistent in his written statements, oral testimony, and reports to his medical care providers and his supervisor as to how the incident occurred on December 30, 2015. Such consistency as to the report of injury weighs in favor of a finding that the incident occurred as alleged.[18] Appellant has also been consistent in his claim that the two-week delay in seeking medical treatment and reporting the employment incident was due to his status as a new employee, his fear of losing his employment position, and his shame in having been inappropriately touched by his coworker. Appellant has provided a reasonable explanation for his delay in reporting his injury and first seeking medical care.

For the reasons set forth above, the Board finds that appellant has adequately and consistently described the December 30, 2015 employment incident and provided reasonable explanations as to his delay in reporting the incident and seeking medical attention. As such, the Board finds that the first component of fact of injury, the claimed incident, occurred as alleged.[19]

Given that appellant has established the December 30, 2015 employment incident, the question becomes whether this incident caused an injury.[20] Thus, the Board will set aside OWCP's April 26, 2018 decision and remand the case for consideration of the medical evidence.[21] Following this and other such development as deemed necessary, OWCP shall issue a *de novo* decision.

[14] *See B.Y.*, Docket No. 18-0702 (issued November 21, 2018).

[15] *See B.H.*, Docket No. 15-0456 (issued July 25, 2016) (the Board found a 12-day delay in reporting a traumatic injury did not cast doubt on the validity of the claim).

[16] *See A.D.*, Docket No. 15-0732 (issued September 29, 2015).

[17] 5 U.S.C. § 8122(a); 20 C.F.R. § 10.100(b).

[18] *See M.L.*, Docket No. 18-0582 (issued October 5, 2018).

[19] *R.E.*, Docket No. 17-0547 (issued November 13, 2018).

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

[21] *T.F.*, Docket No. 12-0439 (issued August 20, 2012).

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the April 26, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision.

Issued: February 15, 2019
Washington, DC

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

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

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