

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

J.M., Appellant)	
)	
and)	Docket No. 19-1077
)	Issued: November 13, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Los Angeles, CA, 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
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On April 16, 2019 appellant, through counsel, filed a timely appeal from a February 1, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 appellant submitted additional evidence on appeal. 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.*

ISSUE

The issue is whether appellant met his burden of proof to establish an injury in the performance of duty on April 23, 2018, as alleged.

FACTUAL HISTORY

On May 25, 2018 appellant, then a 31-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that he developed a left foot abrasion and subsequent left foot infection from walking while in the performance of duty on April 23, 2018. On the back of the claim form the employing establishment noted that he had not reported an injury.

In a development letter dated June 12, 2018, OWCP informed appellant that the evidence of record was insufficient to establish his claim and that it was unclear whether he was claiming a traumatic or occupational injury. It noted that a CD purportedly containing medical records had been received, but no medical records had been uploaded to the integrated Federal Employee's Compensation System. Appellant was advised regarding the factual and medical evidence required to establish his claim. OWCP also requested that he complete an attached questionnaire. Appellant was afforded 30 days to provide the necessary evidence.

In an April 25, 2018 note, Jennifer E. Allen, a nurse practitioner, reported that appellant was seen that day and had been released to return to work without restrictions on May 2, 2018.

An April 27, 2018 computerized tomography scan revealed diffuse subcutaneous edema of appellant's left lower leg extending to the left ankle and foot, minimal right side subcutaneous edema, and no evidence of soft issue or abscess formation or large fluid collection.

An April 27, 2018 surgical report signed by Dr. Aisha Ahmed and Dr. Jonathan Thompson, both podiatrists, noted pathology specimens from appellant's left wound culture revealed aerobic, anaerobic, fungal, and acid-fast bacillus. A surgical procedure was performed by Dr. Thompson which revealed a postoperative diagnosis of left lower extremity necrotizing fasciitis.

In a May 21, 2018 surgical report, Dr. Jaco Festekjian, a surgeon Board-certified in plastic surgery, noted a history of left foot necrotizing infection and related that appellant had undergone left foot split-thickness skin graft.

In a June 11, 2018 note, Dr. Robert Nisenbaum, a Board-certified emergency room physician, reported that appellant was seen on June 11, 2018 and could return to work on July 28, 2018.

On June 18, 2018 OWCP received an undated statement from appellant responding to its questionnaire. Appellant related that he was claiming that he sustained a traumatic injury on April 23, 2018 while delivering mail.⁴ He noted that his satchel was stuffed full of mail and that Mondays are the heaviest days for delivering mail. While proceeding to deliver mail at an

⁴ A July 19, 2018 Weather Channel printout noted that the city of Los Angeles, California had received .11 of an inch of rain on April 19, 2018 and that the forecast for April 23, 2018 was for sunny skies with zero percent chance of rain.

apartment building, appellant felt sharp pain in his left foot when it made contact with the edge of the sidewalk. He also reported feeling a warm sensation in his foot when the pain went away. Appellant continued with his route while noting that his left foot felt warmer than his right foot. At approximately 8:00 p.m. he noticed his left foot was red and swollen. Appellant noted that on April 24, 2018 his foot was still swollen with red irritation between the toes and later that day he noticed blood, serum, and white dead skin on his sock. He sought medical attention and was informed of the severity of his medical condition.

In the April 27, 2018 admission report, from a Veteran's Administration Medical Center, Dr. Brianna Cowan, a Board-certified internist, diagnosed left lower extremity streptococcus and subcutaneous. She noted left debridement had been performed on April 27 and May 1, 2018.

In a June 21, 2018 report, Dr. Nisenbaum diagnosed diffuse tinea pedis which he related was due to appellant's work boots getting wet repeatedly. He reported that appellant was seen in the emergency room on April 27, 2017 and was diagnosed with extensive soft tissue infection. Dr. Nisenbaum summarized the treatment and surgeries provided as a result of the infection. He opined that appellant's "right" lower extremity infection was due to his employment duties including repeated exposure of his feet to moisture and water. The exposure to moisture and water resulted in a breakdown of skin on his feet allowing bacteria into the subcutaneous tissue resulting in necrotizing fasciitis.

By decision dated July 19, 2018, OWCP denied appellant's claim finding that he failed to establish the factual portion of his claim. It found that the evidence submitted was insufficient to establish that the alleged April 23, 2018 incident occurred as alleged. OWCP noted that appellant had not reported the account of injury provided by his physicians, and that the history of injury he had provided on his claim form was inconsistent with his own narrative statement.

In a progress note dated April 25, 2018, Ms. Allen noted that appellant was seen for pain and swelling of toes one week in duration. She reported that he wore boots all day as a mailman, which he continued to wear even if they became wet following exposure to rain. Appellant stated that he had previously been diagnosed with fungus, but his prior condition was not as severe.

In a letter dated July 26, 2018, appellant, through counsel, requested a telephonic hearing, before an OWCP hearing representative. At the hearing appellant testified that after April 23, 2018 he initially sought treatment at a clinic where a nurse practitioner noted cracks on the skin between his toes and indicated that he should use Neosporin. On April 27, 2018 he was diagnosed with a serious foot condition, which required several surgical procedures. Appellant testified that it had rained about two days prior to his abrasion. He stated that his boots were still wet the morning of the alleged incident so he tried to air dry them outside his apartment. However, appellant's boots were still wet when putting them on to go to work. Appellant stated that he had also tried to dry his boots by putting them in the dryer.

By decision dated February 1, 2019, OWCP's hearing representative affirmed the denial of appellant's claim. She found that the evidence of record was insufficient to establish that the specific traumatic incident alleged occurred on April 23, 2018. The hearing representative further found that the medical evidence of record failed to contain a rationalized medical opinion explaining how the diagnosed condition was causally related to the employment factor identified by appellant.

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,⁵ 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.⁶ 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.⁷

To determine if an employee has sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. 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

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. Circumstances such 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 case has been established.¹²

⁵ *H.A.*, Docket No. 18-1466 (issued August 23, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁶ *H.A.*, *id.*; *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁷ *H.A.*, *id.*; *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).

⁸ *J.C.*, Docket No. 18-1503 (issued May 2, 2019); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁹ *M.H.*, Docket No. 18-1737 (issued March 13, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

¹⁰ *A.R.*, Docket No. 19-0924 (issued August 13, 2019); *D.B.*, 58 ECAB 529 (2007); *Gregory J. Reser*, 57 ECAB 277 (2005).

¹¹ *Id.*

¹² *Id.*

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish an injury in the performance of duty on April 23, 2018, as alleged.

Inconsistencies in the record cast serious doubt on the validity of appellant's claim. On his claim form, appellant alleged that he injured his left foot on April 23, 2018 while walking. He clarified, in response to OWCP's request for further information, that he sustained injury on April 23, 2018 when his left foot made contact with the edge of a sidewalk while delivering mail. Appellant did not file his claim until May 25, 2018 and appellant's supervisor noted that appellant had not reported an employment incident occurring on April 23, 2018.

In his testimony at the hearing appellant attributed his condition to wearing wet work boots and he indicated that it had been particularly rainy two days before he noted the abrasion on his left foot. While this history is similar to the history of injury provided by most of his physicians, this allegation contradicts the claimed mechanism of injury most contemporaneous to his claimed injury.¹³ Thus, it is unclear whether appellant is attributing his condition to walking in the performance of duty, injuring his foot while stepping on the edge of a sidewalk, or walking in wet boots over a period of several days. Accordingly, the Board finds that there are discrepancies concerning the mechanism of the alleged injury which cast doubt on the occurrence of the incident.

On appeal counsel contends that OWCP failed to give due deference to the findings of appellant's treating physician. However, the issue before the Board is factual, not medical. For the reasons set forth above, appellant has not met his burden of proof to establish his traumatic injury claim due to the inconsistencies as to how the alleged injury occurred.

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 his burden of proof to establish an injury in the performance of duty on April 23, 2018, as alleged.

¹³ See *S.S.*, 59 ECAB 315 (2008) (the Board has held that contemporaneous evidence is entitled to greater probative value than later evidence).

ORDER

IT IS HEREBY ORDERED THAT the February 1, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 13, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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