

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

G.G., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
LOUIS STOKES CLEVELAND VETERANS)
ADMINISTRATION MEDICAL CENTER,)
Cleveland, OH, Employer)

Docket No. 19-0490
Issued: October 3, 2019

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 3, 2019 appellant, through counsel, filed a timely appeal from a December 12, 2018 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.

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 an injury in the performance of duty on May 26, 2015, as alleged.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On May 30, 2015 appellant, then a 49-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that she twisted her left ankle while in the performance of duty on May 26, 2015. She indicated that she was "[unsure]" as to the cause of injury. The employing establishment controverted appellant's claim, contending that she had originally indicated that her injury occurred at home and that she told her supervisor on May 27, 2015 that "it was an old injury."⁴

On May 27, 2015 appellant was treated in the employing establishment's health unit. Florencio E. Marquinez, a physician assistant, reported that appellant twisted her left ankle the prior day at 10:30 a.m. in the hallway of the progressive care unit (PCU). Appellant did not recall encountering a wet floor or obstacle and she did not recall any past injury to her left ankle. Mr. Marquinez diagnosed left ankle sprain and explained that, given the mechanism of injury, history, and objective findings, her diagnosis was causally related to the workplace injury. Appellant was provided limited-duty work restrictions through June 3, 2015, which included no prolonged walking and no running or jumping. The May 27, 2015 treatment notes were acknowledged and electronically countersigned by Dr. Daniel J. Brustein, a Board-certified internist.

Appellant returned to the employing establishment health unit on June 1, 2015. A left ankle x-ray taken that day revealed no evidence of acute fracture or dislocation. Mr. Marquinez diagnosed healing left ankle sprain/calcaneal spur. He extended appellant's limited-duty work restrictions through June 15, 2015.

On June 2, 2015 Dr. Michael B. Canales, a podiatrist, examined appellant and diagnosed grade 2 ankle sprain. He noted that she reported having sprained her ankle the prior week while at work. Dr. Canales also completed an attending physician's report (Form CA-20) on June 4, 2015 which included a diagnosis of left ankle sprain with a May 26, 2015 date of injury. On the form he indicated that appellant's injury was caused or aggravated by an employment activity.

³ Docket No. 17-1666 (issued August 21, 2018).

⁴ The Form CA-1 was signed by G.M., a nurse manager.

The employing establishment submitted a June 3, 2018 e-mail from appellant's coworker, M.B., who indicated that appellant told her she hurt her foot/ankle at home. M.B. indicated that appellant made the statement on "approximately May 27, 2015."

In a June 4, 2015 e-mail, appellant's supervisor, G.M., indicated that, at approximately 11:30 a.m. on May 27, 2015, she noticed that appellant had a slight limp and asked her why she was limping. According to G.M., appellant replied "I twisted my ankle when I was home." G.M. sent appellant to the employing establishment's health unit to determine whether she could continue to work. She noted that appellant told the healthcare provider(s) that she hurt her ankle at work, however, G.M., contended that appellant never informed her that she was injured at work until G.M., questioned appellant after she returned to work.

In a June 10, 2015 development letter, OWCP advised appellant that the factual and medical evidence received was insufficient to establish her claim. It noted that the evidence was insufficient to establish that she experienced the May 26, 2015 incident as alleged. OWCP attached a factual questionnaire and specifically requested that appellant respond to G.M.'s allegation that appellant advised G.M., on May 27, 2015 that she twisted her ankle at home. It afforded her 30 days to submit the requested factual and medical evidence.

OWCP did not receive a response to its June 10, 2015 factual questionnaire within the time frame allotted.

By decision dated July 17, 2015, OWCP denied appellant's claim, finding that the evidence submitted was insufficient to establish that the employment incident occurred as alleged. It noted that on her CA-1 form she expressed uncertainty as to the cause of her injury and that she failed to respond to the factual questionnaire. Consequently, OWCP found that the requirements had not been met to establish an injury as defined by FECA.

On July 28, 2015 counsel timely requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

On August 14, 2015 OWCP received appellant's August 5, 2015 reply to its questionnaire regarding the facts and circumstances surrounding the alleged May 26, 2015 employment injury. Appellant explained that she was on the employing establishment's premises in the PCU hallway walking from room 325 to room 314 with an electrocardiogram (EKG) machine "to do a stat [emergency] EKG" when she twisted her left ankle. She indicated that there were no witnesses to the incident. Appellant further explained that, after she twisted her ankle, she felt a sharp pain in the talus; however, she continued to room 314 to perform the "stat EKG." She further indicated that, the next day, May 27, 2015, she told her supervisor, G.M., that she twisted her ankle in the PCU, while walking to a patient's room to perform an EKG. Appellant then went to the health unit where Mr. Marquez, a physician assistant, treated her and applied an ace bandage and an air cast.

An oral hearing was held before an OWCP hearing representative on March 15, 2016. At the hearing, appellant testified that at approximately 10:30 a.m. on May 26, 2015 she was walking in the hallway at work with an EKG machine to perform a stat EKG when she twisted her left ankle. She did not immediately report her injury because the pain was not severe, her supervisor

was unavailable, and she believed that she would recover. Appellant continued working, but when she went home that evening her ankle swelled. Further, she indicated that, when she returned to work the following day, May 27, 2015, she reported her injury to her supervisor, G.M.

Appellant denied telling G.M., that she was injured at home. She explained that she wrote “[unsure]” on her Form CA-1 regarding the cause of injury because she was unfamiliar with the form and asked a coworker for assistance. In response to questioning from counsel, appellant testified as follows:

“Q. So when you said – because I asked you, I said, well, what happened? You said, I don’t know what happened; all I know is that it happened.

“A. Yes, sir.

“Q. All right. You didn’t stumble, you didn’t hit anything.

“A. No.

“Q. You were just walking and suddenly your ankle twisted and that’s when it began to hurt, correct?

“A. Yes, sir.”

In further response to questioning from counsel, appellant testified:

“Q. Did your supervisor actually sit down with you and go over this? That’s very important. Here your supervisor is not under oath, but – and you are, but the question is where did she come up with this fact that you said you got hurt at home?

“A. I don’t know, sir. She did not fill out the incident report right away. She did not sit down and listen to my problem, how did this happen. She, you know, because it was too much, you know, like I think going on in the meeting and stuff like that and she just gave me the slip real quick and she said go down to – she did not, you know like let me explain, you know, how did it happen and stuff like that, so she gave me real quick the slip and then, you know, so – and then I went down to – then I told her, I said, this happened and she told me that there’s too much paperwork and you know, like I – she said you have to fill up the paperwork and I have to fill up the paperwork. I explained to her, I said, I just state I am – what happened myself on the computer as much – best of my knowledge and she filled up, you know, herself from her side.”

Subsequent to the hearing, appellant provided an April 15, 2016 statement reiterating her testimony. She also described her medical treatment, which included an October 29, 2015 left ankle surgical procedure.

OWCP also received a report of contact (VA Form 119) with “May 26, 2015” listed as the date of contact. In this form, appellant explained that she was in the PCU hallway walking to a patient room with an EKG machine when she twisted her left ankle.

By decision dated June 24, 2016, OWCP's hearing representative affirmed the June 17, 2015 decision. He explained that the inconsistencies in the factual evidence had not been resolved. The hearing representative noted that contemporaneous statements from appellant's supervisor and a coworker indicated that appellant initially reported that she injured her foot/ankle at home. This evidence, coupled with her uncertainty about the cause of injury as indicated on her Form CA-1, was inconsistent with her claim. The hearing representative noted that appellant attempted to refute statements from her coworkers, but did not produce convincing evidence to corroborate her account.

On December 5, 2016 counsel requested reconsideration and submitted additional factual and medical evidence.

In an undated statement, S.B., a coworker in the PCU, indicated that appellant told her it felt like she had twisted her left ankle while walking to do an EKG, that S.B. advised appellant to go to the emergency room, and that appellant indicated that she would try to walk on it. She noted that appellant continued to work because it was a very busy shift which she identified as "May 29, 2015." S.B. indicated that, on the following day, appellant's ankle was swollen, appellant had been putting ice on it, she was limping, and another nurse suggested that appellant use a wrap on her ankle, which she did.

A.W., a nurse who stated that she had been appellant's coworker for 10 years, provided an undated statement indicating that appellant was "a very honest person and worker." She further stated that appellant went to the employing establishment health unit on May 27, 2015 to have her ankle evaluated. A.W. related that on May 30, 2015 she helped appellant file for a work-related injury and noted that appellant had previously asked several individuals to help her complete her claim form, but no one helped her. She also related that, at the time they were completing the form, she and appellant were unsure of the severity of the injury.

In a July 27, 2016 statement, J.C., a registered nurse, noted that on May 26, 2015 she observed appellant at work "walking with difficulty." She indicated that appellant complained of pain in her ankle and as the day progressed, she observed that appellant's ankle was swollen and she helped appellant with a bandage. J.C. further stated that she and other coworkers advised appellant to see her physician or go to the emergency room. Appellant told J.C. that she would see a physician at the health unit the next day, May 27, 2015.

In a July 29, 2016 statement, R.W., appellant's coworker, indicated that the day after the injury, appellant spoke with her coworkers concerning the incident, that her ankle was swollen and she could hardly bear weight on it, and that, over the course of time, her ankle progressively worsened, until she could hardly walk and she had to have surgery.

Counsel also resubmitted appellant's previous response to OWCP's June 10, 2015 factual development questionnaire.

In a September 19, 2016 report, Dr. Canales noted that appellant had been in his care after sustaining a work-related injury to her left ankle. He explained that she injured herself on the job while walking and carrying a piece of equipment. The injury resulted in an inversion ankle sprain and eventual need for surgical intervention for repair of appellant's lateral collateral ligaments.

By decision dated June 1, 2017, OWCP denied appellant's request for reconsideration of the merits of her claim, finding that the evidence submitted was cumulative, repetitious, and insufficient to warrant review of its prior decision. It explained that the evidence was substantially similar to evidence or documentation previously considered. OWCP specifically noted that the statements from appellant's coworkers and physician discussed the after-effects of the claimed injury. It explained that the statements failed to identify the same date of injury reported by appellant and did not indicate that they witnessed the injury. OWCP found that the statements did not support that a workplace injury occurred on May 26, 2015 as alleged.

On July 28, 2017 appellant, through counsel, appealed the June 1, 2017 OWCP decision to the Board. By decision dated August 21, 2018, the Board found that OWCP improperly denied her request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a). The Board found that the new witness statements and medical report from Dr. Canales constituted relevant and pertinent new evidence not previously considered by OWCP. The Board set aside the June 1, 2017 OWCP decision and remanded the case for a decision on the merits as to whether appellant sustained an injury in the performance of duty on or about May 26, 2015.

On return of the case record, by a December 12, 2018 decision, OWCP denied modification. It found that appellant had not submitted factual evidence sufficient to establish that the May 26, 2015 employment incident occurred, as alleged.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁵ 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 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 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 on a traumatic injury or an occupational disease.⁷

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.⁸ Generally, fact of injury consists of two components that must be considered in conjunction with each another. First, the employee must submit sufficient evidence to establish that he or she

⁵ *Supra* note 2.

⁶ *J.R.*, Docket No. 18-1079 (issued January 15, 2019); *C.S.*, Docket No. 08-1585 (issued March 3, 2009); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

⁷ *See C.M.*, Docket No. 19-0009, (issued May 24, 2019); *see C.R.*, Docket No. 18-1332 (issued February 13, 2019); *S.P.*, 59 ECAB 184 (2007).

⁸ *See S.W.*, Docket No. 18-1653 (issued March 12, 2019); *C.C.*, Docket No. 17-1722 (issued July 5, 2018); *B.F.*, Docket No. 09-0060 (issued March 17, 2009).

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 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 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.¹² 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.¹³

ANALYSIS

The Board finds that appellant has met her burden of proof to establish that the May 26, 2015 employment incident occurred, as alleged.

On her May 30, 2015 Form CA-1, appellant indicated that on May 26, 2015 she twisted her left ankle while in the performance of duty. In response to OWCP's questionnaire, she provided an August 5, 2015 statement explaining that on May 26, 2015 she was on the employing establishment's premises in the PCU hallway walking from room 325 to room 314 with an EKG machine "to do a stat [emergency] EKG" when she twisted her left ankle. Appellant noted that there were no witnesses to the incident. When she twisted her ankle, she felt a sharp pain in the talus; however, she continued to room 314 to perform the "stat EKG." Appellant further noted that, the next day, May 27, 2015, she informed her supervisor, G.M., that she twisted her ankle in the PCU, while walking to a patient's room to perform an EKG. She was treated at the health unit by Mr. Marquinez, a physician assistant, who applied an ace bandage and an air cast. Dr. Brustein signed-off on the treatment administered.

At the March 15, 2016 hearing, appellant's testimony was consistent with her answers to OWCP's questionnaire. Further, she denied allegations made by her supervisor that she was injured at home. Appellant explained that her supervisor did not listen to her explanation regarding how the May 26, 2015 employment incident occurred, and quickly gave her the claim form to complete because her supervisor was busy at the time. A nurse, A.W., indicated that she had worked with appellant for 10 years and that appellant was an honest person. She went on to explain that she assisted appellant in completing the claim form after no one else helped her, and noted

⁹ *M.M.*, Docket No. 18-0769 (issued September 10, 2018); *D.B.*, 58 ECAB 464 (2007); *David Apgar*, 57 ECAB 137 (2005).

¹⁰ *W.C.*, Docket No. 18-1651 (issued March 7, 2019); *M.M.*, *id.*; *John J. Carlone*, 41 ECAB 354 (1989).

¹¹ *A.C.*, Docket No. 18-1567 (issued April 9, 2019); *Gregory J. Reser*, 57 ECAB 277 (2005).

¹² *A.C.*, *id.*; *Joseph H. Surgener*, 42 ECAB 541, 547 (1991).

¹³ *A.C.*, *id.*; *Betty J. Smith*, 54 ECAB 174 (2002).

that appellant went to the personnel health unit on May 27, 2015 to get her ankle evaluated. Additionally, A.W. noted that at the time she assisted appellant in completing the claim form, neither one of them were aware of the severity of her injury.

In testifying as to why appellant wrote “unsure” on her Form CA-1 regarding the cause of injury, she replied that she was unfamiliar with the form and had asked for assistance in completing it. She further testified that she did not know what happened to her ankle, “all I know is that it happened.” Appellant added that while she was walking she twisted her ankle and experienced pain.

Appellant also provided a report of contact on an employing establishment form (VA Form 119) containing the date of May 26, 2015, which is the same date as the alleged injury. She again indicated that she was in the PCU hallway walking to a patient room with an EKG machine when she twisted her left ankle.

While appellant acknowledged that there were no eyewitnesses to the injury, there are witness statements that support that she injured her ankle at work. S.B., a coworker, indicated that appellant informed her that she had twisted her left ankle while walking to a patient’s room to perform an EKG, which is consistent with the injury reported by appellant, although S.B. listed the date as “May 29, 2015.” J.C., a registered nurse, noted that on May 26, 2015 she observed appellant at work “walking with difficulty” and as the day progressed she observed that appellant’s ankle was swollen. R.W., another coworker, indicated that appellant spoke to her about the incident the day after it occurred, which was May 27, 2015.

The medical evidence of record also substantiated appellant’s description of the May 26, 2015 incident. On May 27, 2015 she was treated in the employing establishment’s health unit by Mr. Marquinez, a physician assistant, who reported that she twisted her left ankle the prior day at 10:30 a.m. in the hallway of the PCU. Dr. Brustein acknowledged Mr. Marquinez’ treatment of appellant and cosigned the report. Dr. Canales provided a June 2, 2015 report in which he diagnosed a grade 2 ankle sprain and noted that she related that she sprained her ankle the prior week while at work. He also completed a Form CA-20 on June 4, 2015 and diagnosed a left ankle sprain with a May 26, 2015 date of injury.

While the employing establishment alleged that appellant indicated that she injured herself at home, she denied this allegation, and she provided a singular account of the mechanism of injury.¹⁴ In addition, appellant’s actions surrounding the incident corroborate her description. She stopped work and sought medical treatment the next morning, after explaining that her symptoms worsened overnight. As noted, 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 unless refuted by strong or persuasive evidence.¹⁵ The Board finds that appellant’s description of the claimed May 26, 2015

¹⁴ See S.W., Docket No. 17-0261 (issued May 24, 2017) (the Board found that OWCP improperly determined that the alleged employment incident did not occur 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).

¹⁵ *Supra* note 11.

employment incident, together with her hearing testimony, the witness statements, and subsequent course of action, including medical treatment, are sufficient to establish that the May 26, 2015 employment incident occurred at the time, place, and in the manner alleged. Therefore, the Board finds that she has established that the May 26, 2015 employment incident occurred in the performance of duty, as alleged.

As appellant has established that the May 26, 2015 employment incident factually occurred, the question becomes whether this incident caused an injury.¹⁶ The Board will, therefore, set aside OWCP's December 12, 2018 decision and remand the case for consideration of the medical evidence. Following this and such further development as deemed necessary, OWCP shall issue a *de novo* decision addressing whether appellant has met her burden of proof to establish an injury or medical condition and any attendant disability causally related to the accepted employment incident.

CONCLUSION

The Board finds that appellant has met her burden of proof to establish that the May 26, 2015 employment incident occurred in the performance of duty, as alleged. The Board further finds that this case is not in posture for a decision whether she has established an injury or condition causally related to the accepted May 26, 2015 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the December 12, 2018 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: October 3, 2019
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹⁶ A.A., Docket No. 18-1063 (issued June 26, 2019); *see Willie J. Clements*, 43 ECAB 244 (1991).

Alec J. Koromilas, Alternate Judge dissenting:

The majority finds that appellant has met her burden of proof to establish that the May 26, 2015 employment incident occurred as alleged. I disagree.

Appellant initiated her CA-1 claim form on May 30, 2015, four days after her alleged incident. On her form she reported an injury date of May 26, 2015. Responding to the inquiry asking the cause of injury, she responded, "unsure." With regard to the inquiry as to the nature of injury, appellant responded, "twisted my left ankle." On the reverse side of the form, the supervisor, G.W., indicated that appellant told her that "it was an old injury" and "it originally occurred at home and now aggravated." Under the physician's section, Dr. Elizabeth Mease, Board-certified in internal and occupational medicine, responding to the question whether her knowledge of the facts about this injury agreed with the statements of the employee, answered that appellant "told supervisor it was an old injury at 13:20 on May 27, 2015."

In a separate e-mail, the supervisor indicated that on May 27, 2015 at approximately 11:30 a.m. she noticed appellant's slight limp and asked what had happened. She recounted that appellant responded, "I twisted my ankle when I was home." Later that day, at 13:33 hours, appellant, upon direction of G.W., visited the health unit. She told the physician assistant that she had twisted her ankle in the PCU hallway several days before. Also of record was an e-mail from M.B., another nurse who recounted in an e-mail to G.W., dated June 3, 2015, that on May 27, 2015 at 13:20 hours, appellant told her that "she hurt her foot/ankle at home when she twisted it walking."

A development letter, including a factual questionnaire, was sent to appellant specifically asking her to address the supervisor's statement that the injury occurred at home; however, OWCP received no response. As such, OWCP denied the claim on July 17, 2015.

Appellant sought counsel and an oral hearing was requested. A factual response to OWCP's original questionnaire was received on August 14, 2015, where appellant recounted that she fell in the PCU hallway enroute to perform an EKG. Appellant did not address the issue of why her supervisor recounted her telling a different story. At the hearing, she testified that she twisted her ankle at work, but did not report it as she was not in severe pain and continued working. Appellant reported that, later that evening, her ankle swelled. She denied ever telling her supervisor that she was injured at home.

Following the hearing representative's affirmance of the denial, appellant requested reconsideration and submitted a series of coworkers' witness statements. Two of the witness statements were undated. S.B., indicated that appellant "told her she twisted her left ankle walking in a hall to perform an EKG." She identified the date as "May 29, 2015." A statement from A.W., indicated that she advised appellant to go to the health unit on May 27, 2015 to have her ankle evaluated and that she received help filing her injury claim. The third witness, J.C., in a statement dated July 27, 2016, over a year postinjury, indicated that she witnessed appellant walking with difficulty on May 26, 2015 and that she advised appellant to seek treatment. In a statement from R.W., dated July 29, 2016, over a year postinjury, indicated that she spoke to appellant the day after the injury and that her ankle was swollen.

The history of injury by appellant in this case is anything, but consistent. At the outset, the four witness statements supply little to no proof as to the event in question. Two are undated so there is no timestamp as to how close in time these recollections were made. The undated statement of S.B. is the only one that makes reference to an incident by indicating that appellant, “told her it happen in the PCU hall.” However, appellant erroneously listed the date of occurrence as March 29, 2015. The other witness statements only elucidate that appellant was walking with difficulty and that her ankle was swollen. Conversely, the statements from the supervisor, G.M., are clear and fairly contemporaneous to the alleged incident. Additionally, M.B. also submitted a statement in very clear language recounting what appellant had reported was also contemporaneous, dated, and timestamped. As well, Dr. Mease on the reverse side of the CA-1 form also recorded appellant’s statement that she told her supervisor it was an old injury at 13:20 on May 27, 2015.

Lastly, the statements of appellant are most critical to determine the occurrence of injury. The Board has held that inconsistent responses cast serious doubt on the validity of the claim.¹ Allegations alone by a claimant are insufficient to establish a factual basis for a claim.² A claimant must substantiate such allegations with probative and reliable evidence.³ The first item of review is the CA-1 form as it is the first recitation by the injured party as to events alleged. On that form appellant noted, “unsure” as to the cause of injury. The question is quite straightforward. Common sense dictates that the reporting of the etiology of a traumatic injury several days later would be fairly precise and distinct. However, misstatements can be made. When such occurs, it is incumbent upon appellant to remedy the misstatement with evidence or explanation. In this case, appellant was unable to answer the direct question after several attempts as to why she used the term “unsure” as to the cause of the injury. Additionally, during the hearing, she denied she told her supervisor it happened at home with a one word answer “no,” which was woefully unconvincing. Further, an argument could be made that the supervisor was mistaken, or made such a statement out of a veiled animus, however, no accusation nor proof was offered to indicate either. Adding to their believability and veracity is the fact that both G.W.’s and M.B.’s statements are clear, dated and time stamped contemporaneously with the incident. Statements made closest to the time of injury are often the most precise. In this instance, appellant’s responses to inconsistencies and contradictions were not remedied.

¹ *B.P.*, Docket No.19-0306 (issued August 9, 2019).

² *W.F.*, Docket No. 17-0640 (issued December 7, 2018); *Charles E. McAndrews*, 55 ECAB 711 (2004).

³ *Id.*

There is no doubt that appellant suffered a swollen ankle, however, that is not the issue before us. The issue is whether appellant has met her burden of proof to establish that the incident occurred as alleged. In that regard, given her inconsistent statements, failure to remedy same with many opportunities to do so, the contemporaneous dated notes of her supervisor indicating otherwise, I believe she has not and, as such, I would affirm and respectfully dissent from the majority opinion.

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