United States Department of Labor
Employees' Compensation Appeals Board

M.H., Appellant	)	
and	)	**Docket No. 19-0930**
	)	**Issued: June 17, 2020**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Las Vegas, NV, 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:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 27, 2019 appellant, through counsel, filed a timely appeal from a January 28, 2019 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.

[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 his burden of proof to establish an injury in the performance of duty, as alleged.

FACTUAL HISTORY

On April 7, 2018 appellant, then a 56-year-old transportation security officer (screener), filed a traumatic injury claim (Form CA-1) alleging that at 4:30 p.m. on Friday April 6, 2018 he sustained a left knee and low back injury when he tripped on torn carpet while in the performance of duty.[3] He notified his supervisor, stopped work, and first received medical treatment on April 7, 2018. On the reverse side of the claim form, C.H., appellant's supervisor, controverted the claim, contending that appellant was not in the performance of duty at the time of the alleged occurrence.

In an April 7, 2018 signed statement, appellant reported that his injury occurred at 4:20 p.m. on Friday, April 6, 2018 at the C Annex Checkpoint underneath the monitors near the Metropolitan Police Department podium. He asserted that he was walking to sit down on a chair under the departure/arrival monitors when he tripped on the carpet and fell, hitting his left knee and also injuring his lower back. Appellant contacted his supervisors on April 7, 2018. He explained that, when his injury occurred, he continued to work his shift and did not realize the extent of his injuries until he visited urgent care. Appellant reported that no one directly witnessed his fall, but he informed his coworkers of his injury.

An employing establishment incident report documents that appellant called the hotline on April 7, 2018 to notify the employing establishment that on April 6, 2018 he tripped and fell, injuring his left knee and lower back. It was noted that the injury occurred at 4:20 p.m.

An April 7, 2018 attending physician's report (Form CA-20) from Dr. Nickolas Karajohn, a family medicine physician, indicated that appellant sought treatment for an April 6, 2018 injury when he fell at work. The physician noted a history of prior left knee surgery and diagnosed left knee strain and lumbar strain.

Dr. Sinoneta Soriano, a Board-certified family practitioner, reported that appellant was seen on April 7, 2018 for left knee and back injuries which occurred when he tripped and fell on a carpet at work. In a hospital encounter form report from Dr. Soriano dated April 7, 2018, appellant's history of injury was recorded as a trip and fall on ripped carpet while walking to C Annex Security Checkpoint on April 6, 2018 at 4:25 p.m.

An April 9, 2018 progress note and work capacity evaluation (Form OWCP-5c) was also submitted from Dr. Karajohn documenting treatment and referrals for a magnetic resonance imaging (MRI) scan of the left knee.

The employing establishment issued an authorization for examination and/or treatment (Form CA-16) on April 10, 2018, which allowed appellant to obtain treatment at Enterprise Quick

[3] Appellant's regularly scheduled work shift ran Sunday through Thursday from 4:30 p.m. to 1:00 a.m. daily.

Care for the claimed April 6, 2018 injury. It indicated that there was doubt as to whether his condition was caused by an injury in the performance of duty.

In a development letter dated April 27, 2018, OWCP informed appellant that the evidence of record was insufficient to establish his claim. It advised him of the type of factual and medical evidence necessary and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence.

Medical reports dated April 9, 2018 documenting x-rays of the left knee and lumbar spine, along with form reports and disability slips, were also submitted.

By letter dated May 25, 2018, the employing establishment challenged the claim after an internal fact-finding investigation. It found that review of a 24-hour closed circuit surveillance video did not establish that the claimed incident took place. The employing establishment reported that appellant made several statements indicating that he was injured on April 6, 2018 before clocking in for his shift around 4:30 p.m. at the C Annex Checkpoint when he tripped over loose carpet and fell into chairs under the departure/arrival monitors. However, review of video footage of appellant at that time, date, and location did not reveal that the incident took place. The employing establishment noted that appellant was clearly seen on the surveillance footage at the C Annex Security Checkpoint on or about 4:30 p.m. on April 6, 2018. However, the footage did not show that appellant experienced a trip on the carpet resulting in his fall to the ground, or otherwise, resulting in an injury. Appellant's manager G.R. reviewed the footage and further found that appellant was not seen tripping, stumbling, or bracing himself on the chairs. The employing establishment noted that appellant further alleged that he reported the incident to his coworkers, but the coworkers he identified had refuted his allegation. Accompanying witness statements were provided in support of the claim challenge.

In an April 7, 2018 statement, supervisor C.H. reported that appellant advised him on that date of the April 6, 2018 employment incident at the C Annex Checkpoint. Appellant reported that he fell down over some chairs up against the wall due to a tear in the carpet square before he clocked in to start his shift on April 6, 2018. He demonstrated where he had fallen and informed C.H. that he could no longer perform his employment duties. C.H. provided appellant with the Form CA-1 packet.

In an April 7, 2018 employing establishment report form, M.G., a supervisory reporting officer, related that she assisted appellant with filing his Form CA-1. Appellant had advised that he had fallen on some loose carpet near the podium behind C Annex Checkpoint at approximately 4:20 p.m. on April 6, 2018.

In an April 12, 2018 statement, C.M., a coworker, reported that on April 6, 2018 he came to work and sat down underneath the departure board at C Annex Checkpoint near the Metropolitan Police Department podium as he waited to clock in for his shift. Appellant walked up to him and sat down beside him around 4:20 p.m. C.M. reported that appellant was walking fine and they both stood up and clocked in at 4:25 p.m. He further stated that appellant did not talk to him about any injury that occurred on April 6, 2018 and did not say anything about an injury to him.

An April 13, 2018 statement was submitted from manager G.R. who had a telephone conversation with appellant on April 10, 2018 to inquire about what transpired on April 6, 2018 when he was injured. He found that the allegations and statements made by appellant were not supported after reviewing the April 6, 2018 surveillance video. G.R. noted that review of the video footage revealed that appellant never walked directly towards the row of chairs under the monitors next to the podium as appellant had stated, and not once was he observed tripping, stumbling, or bracing himself on the chairs. He further reported that review of the surveillance footage showed that at no time was appellant limping after getting up from the chair when he walked to the time clock, clocked-in, and proceeded to the C Annex breakroom. G.R. further noted that appellant alleged that another employee, C.M., was sitting in the chairs when the injury took place, though he was looking down and did not witness the incident. Appellant had asserted that after he sat down, he advised C.M. of what had just transpired and told him that his knee hurt a lot. However, C.M. had provided a statement refuting these assertions.

In e-mail correspondence dated May 4, 2018, the employing establishment requested that appellant provide information pertaining to his work-related injury by responding to a series of questions. Appellant responded to the e-mail stating that his injury occurred on April 6, 2018 at approximately 4:20 p.m. at C Annex Security Checkpoint near the bypass doors and the Metro podium. He reported that, immediately prior to the incident, he was walking from the breakroom to sit down on the chairs prior to clocking in. The incident occurred when appellant was walking and tripped on the carpet, and when he tripped, he hit his left knee on the front of the row of chairs. Immediately, after the incident, he mentioned the injury to his coworkers, C.M. and D.B.

By decision dated May 29, 2018, OWCP denied appellant's claim finding that the evidence of record was insufficient to establish that the April 6, 2018 employment incident occurred as alleged. It noted that he had not responded to the April 27, 2018 development questionnaire to substantiate the factual element of his claim and evidence had shown that the April 6, 2018 employment incident did not occur in the manner alleged. OWCP concluded therefore that the requirements had not been met to establish an injury as defined by FECA.

On June 5, 2018 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. A hearing was held on November 13, 2018. During the hearing, appellant testified that his injury actually occurred on April 5, 2018 and he mistakenly had written the date down as April 6, 2018. He explained that he was injured on April 5, 2018 at the C Annex Security Checkpoint in McCarran Airport. Appellant noted that he had a preexisting injury two and one-half years ago, but he had been doing well and his low back and left knee were fine when he started his shift on that day. While walking to the checkpoint, he was looking up at the flight monitors and tripped on a loose piece of carpet, causing him to bang his knee on the row of permanent steel leather chairs beneath the flight monitors. Appellant reported stumbling, but not falling to the ground, causing him to also injure his back as he tried to catch himself from falling backwards. He explained that the incident occurred early in his shift and he continued to finish his workday. Appellant was not aware of any eyewitnesses and no one came forward as a witness to the event. He explained that, on the date of injury, he sent a text message to E.R., a coworker, informing her of his injury with pictures of the carpet and his left knee. Appellant also reported speaking to D.S. and I.S. about his injury after they asked him why he was limping. He explained that he did not report the injury on the day it happened because all of his supervisors had called off work and that there was no supervisor on duty that he could report the incident to. Appellant

did not seek medical treatment on the following date, April 6, 2018, because they were shorthanded at work and he did not feel that his pain was severe enough. He finished his shift on April 6, 2018 and noted that there were also no supervisors on duty to inform them of his injury. On April 7, 2018 appellant reported his injury, filed a Form CA-1, and sought treatment at an urgent care facility. He discussed his course of medical treatment and explained that he had made a Freedom of Information Act request for the surveillance videos which were reviewed by the employing establishment. Appellant was provided 1 hour and 15 minutes of video coverage on April 6, 2018 and approximately 30 minutes of video coverage on April 5, 2018. He reported that he did not see the tripping incident or any evidence of injury in the April 5, 2018 video footage. Appellant further stated that he did not see the tripping incident in the April 6, 2018 video, but did see evidence of the injury. He explained that the April 6, 2018 footage from the day after the injury showed him coming down the escalators in a lot of pain and limping down the stairs onto the checkpoint as he was starting his shift. OWCP's hearing representative advised appellant that the record would be held open for 30 days to submit additional evidence.

Following the hearing, appellant submitted additional medical reports documenting treatment for his lumbar and left knee injury.

Appellant also submitted a September 1, 2018 statement from R.E., a coworker, who reported that, on or about April 6, 2018, she received a text message from him with pictures of an injury to his knee. He informed her that he had tripped and fallen near the back of his duty station because of a torn carpet and sent her pictures of the carpet. R.E. reported that she had no reason not to believe appellant's claim as she had previously expressed concerns about the carpet.

In an October 22, 2018 statement, appellant reported that on April 5, 2018 he was ill due to migraines and cluster headaches. He reported that he tripped on an old worn carpet at C Annex Security Checkpoint which caused injury to his left knee and low back. At the time of the incident appellant did not think that his injuries were very serious. He worked through that shift and also the next shift, while limping and in severe pain. Appellant stated that he could not get his trousers over his swollen left knee, causing him to seek treatment at an urgent care facility where he had x-rays administered. He was advised not to walk on his left knee and to follow up with a left knee MRI scan. On April 7, 2018 appellant called OWCP, notified his supervisors, and filed a Form CA-1.

By decision dated January 28, 2019, OWCP's hearing representative affirmed the May 29, 2018 denial of the claim, finding that the evidence of record was insufficient to establish that the 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 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.[4] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or occupational disease.[5]

In order to determine whether an employee actually sustained an injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established.[6] Fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.[7] The second component is whether the employment incident caused a personal injury.

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.[8] The employee has not met his burden of proof to establish the occurrence of an injury when there are inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.[9] 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 sufficient doubt on an employee's statements in determining whether a *prima facie* case has been established. An employee's statements 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]

ANALYSIS

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

Appellant filed a Form CA-1 on April 7, 2018 alleging that he had sustained a left knee injury which occurred the previous day, April 6, 2018, when he tripped on torn carpet at approximately 4:30 p.m. before clocking in for his shift at the C Annex Security Checkpoint. Following OWCP's initial denial of the claim, a hearing was held on November 13, 2018. Appellant testified that his injury occurred on April 5, 2018 and not April 6, 2018 as previously alleged. He reported that he mistakenly wrote April 6, 2018 as the date of injury which actually occurred on April 5, 2018 at the C Annex Security Checkpoint early in his work shift.

[4] *E.A.*, Docket No. 17-0330 (issued December 12, 2018); *Gary J. Watling*, 52 ECAB 278 (2001).

[5] *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Michael E. Smith*, 50 ECAB 313 (1999).

[6] *D.B.*, Docket No. 18-1348 (issued January 4, 2019).

[7] *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[8] *M.F.*, Docket No. 18-1162 (issued April 9, 2019); *Charles B. Ward*, 38 ECAB 667, 67-71 (1987).

[9] *See V.J.*, Docket No. 19-1600 (issued March 13, 2020); *E.C.*, Docket No. 19-0943 (issued September 23, 2019).

[10] *See M.C.*, Docket No. 18-1278 (issued March 7, 2019); *D.B.*, 58 ECAB 464, 466-67 (2007).

Given that appellant clarified his date of injury to April 5, 2018, the Board finds that the case must be remanded to request additional information from the employing establishment concerning the April 5, 2018 incident, including a description of the location, duration, and details depicted in surveillance video. Although the employing establishment provided a detailed review of the April 6, 2018 surveillance footage, after appellant clarified his date of injury to April 5, 2018 at the November 13, 2018 hearing, OWCP failed to request information from the employing establishment regarding surveillance video footage for the April 5, 2018 date of injury as it had done for the initial April 6, 2018 date of injury.

While the claimant has the burden of proof to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other governmental source.[11] Without additional information from the employing establishment pertaining to the alleged April 5, 2018 employment incident, OWCP has failed to procure the evidence necessary to determine whether the April 5, 2018 employment incident occurred as alleged. On remand, the employing establishment shall confirm whether surveillance video from April 5, 2018 established that appellant was injured at the time, place, and in the manner alleged. It shall also provide a copy of the surveillance video to OWCP, if available. Following this and any other further development deemed necessary, OWCP shall issue a *de novo* decision.[12]

CONCLUSION

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

[11] *See L.L.*, Docket No. 12-194 (issued June 5, 2012); *N.S.*, 59 ECAB 422 (2008).

[12] The Board notes that the employing establishment issued a 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).

ORDER

IT IS HEREBY ORDERED THAT the January 28, 2019 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: June 17, 2020
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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