United States Department of Labor
Employees' Compensation Appeals Board

F.H., Appellant	)	
and	)	**Docket No. 18-0869**
	)	**Issued: January 29, 2020**
U.S. POSTAL SERVICE, POST OFFICE, Atlanta, GA, 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:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On March 19, 2018 appellant, through counsel, filed a timely appeal from a February 9, 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.

[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 June 26, 2013, as alleged.

FACTUAL HISTORY

On November 24, 2014 appellant, then a 49-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that, on June 26, 2013, she sustained a right foot and ankle injury due to excessive standing and walking while in the performance of duty. She also indicated that she had a one and one-half inch tear of the cartilage, collapsed arches, and had undergone osteochondritis triple arthrodesis surgery in November 2013. On the reverse side of the form, the employing establishment noted that appellant briefly stopped work on June 26, 2013, but returned to work on that same day.

On December 2, 2014 OWCP received a letter dated April 1, 2010, from an employing establishment health and resource specialist challenging appellant's claim arguing that she did not provide any medical evidence to support her claim or complete her Form CA-1 until November 24, 2014, more than one year after the alleged injury occurred.

In a development letter dated December 3, 2014, OWCP informed appellant that the factual and medical evidence of record was insufficient to support her claim. It advised her of the type of factual and medical evidence needed and provided a questionnaire for her completion. Appellant was afforded 30 days to submit the requested evidence. No further evidence was received.

By decision dated January 8, 2015, OWCP denied appellant's claim, finding that the factual component of fact of injury had not been met. It found that the evidence was insufficient to establish that an employment incident occurred as alleged.

On October 13, 2015 appellant requested reconsideration. She provided details regarding her employment history, relating that she had been employed at the employing establishment since November 28, 1987 as a city carrier. Appellant explained that she had prior claims and problems with her foot and ankle dating back to 1997, when she fell down stairs at work.[3] She explained that in August 2013 she had a severe flare up and she could barely walk or stand due to the pain and swelling. Appellant noted that she went to work on August 4, 2013 and her foot was so swollen that it was protruding out of her work shoe. She explained that her supervisor instructed her to file a Form CA-2 and her claim was denied.[4] Appellant indicated that she went to her union steward and she was instructed to file a new claim and she filed a Form CA-1, which was denied because of missing information.

[3] The record indicates that appellant had a prior claim for a traumatic injury claim on August 18, 1997, under OWCP File No. xxxxxx875. OWCP indicated that it was accepted for a right ankle sprain. Appellant's June 18, 2013 claim for recurrence of disability was denied on September 23, 2014.

[4] The current record does not substantiate that appellant filed an occupational disease claim (Form CA-2) for an August 2013 right foot injury.

In a July 17, 2015 treatment note, Dr. Joshua J. Mann, a podiatrist, related that appellant initially injured her right ankle and foot after falling down stairs at work in 1997. He indicated that he saw her in August 2013 for symptoms consistent with posterior tibial dysfunction. Dr. Mann indicated that this type of pathology occurred in individuals with flat feet after standing for long periods of time on hard surfaces. He advised that appellant received treatment and was released to work on September 8, 2014. Dr. Mann explained that she was not able to tolerate working her route and was now in a supervisory position. He advised that appellant continued to have pain and swelling after long periods of standing and walking.

By decision dated December 21, 2015, OWCP denied modification of its prior decision.

On September 13, 2016 appellant requested reconsideration. She explained that she was hired as a city carrier on November 28, 1987. Appellant indicated that she became a supervisor in 2010, which required that she fill in when other managers or supervisors were out. She explained that she would normally work two days a week at the higher level and three days as a carrier. However, appellant had worked as a full-time supervisor since her return to work in July 2014 due to her injury and surgery.

Appellant described her carrier duties which included: casing mail; lifting buckets of mail; sorting parcels; getting the route ready for street delivery; walking; bending; lifting with a weight limit of 70 pounds; climbing stairs; pushing heavy equipment containing mail; delivering packages and going up long driveways; climbing up steps, standing at least 90 percent of the day and sitting 10 percent. She noted that her route had a mixture of walking, riding, and delivering mail to businesses, apartments and residential and explained that these were the bulk of her duties beginning November 28, 1987 to February 2010.

Appellant indicated that her duties as a supervisor entailed standing, walking, and supervising carriers, in the morning. She was also engaged in constant walking, counting mail from the dispatch trucks and street supervision in the afternoon. Appellant explained that 90 percent of her day was constant moving, although she had flexibility to rest her right foot and ankle when needed. She noted that morning reports and telecoms was about 10 percent of the day. Appellant indicated that, prior to her federal service, she had no conditions of any kind to her right foot and ankle, which were perfectly normal. She explained that the onset of all the problems related to her right foot and ankle arose from her fall in 1997. Appellant also confirmed that she did not have any other falls, slips or injuries to her right foot and ankle.

Appellant also completed OWCP's factual development questionnaire on October 16, 2016. She described her 1987 injury[5] noting that she was delivering mail and fell down five slippery steps. Appellant indicated that she landed on her bottom on the right side and her right foot/ankle twisted underneath her when she tried to break her fall. She reiterated that since this injury she did not have any other accidents and that she immediately reported her injury to her supervisor. Appellant explained that she was claiming a traumatic injury.

[5] While appellant noted the injury had occurred in 1987, this appears to be a typographical error as her injury occurred in 1997.

By decision dated November 16, 2016, OWCP denied modification of the prior decision.

On September 11, 2017 appellant, through counsel, requested reconsideration and submitted a report from Dr. Mann. In his June 6, 2016 report, Dr. Mann again noted that appellant injured her ankle in 1997. He described her injury and treatment, which included a visit on August 16, 2013. Dr. Mann opined that appellant's condition was "most likely" aggravated by her work injury of 1997, and years of wear and tear performing her work duties.

By decision dated September 27, 2017, OWCP denied appellant's request for reconsideration of the merits of her claim, finding that the evidence submitted was irrelevant, immaterial and had no bearing on the issue or was inconsequential in regards to the issue.

On November 13, 2017 appellant, through counsel, requested reconsideration and submitted additional evidence.

In a May 6, 2016 statement, appellant again described her work history of delivering mail since November 28, 1987. She explained that she was engaged in standing and walking 90 percent and sitting 10 percent of the time. Appellant described her route as a mixed route that included riding, walking, delivering mail to businesses, residential, apartments, climbing stairs, lifting heavy parcels with a maximum weight of 70 pounds. She noted that she became a relief supervisor in 2010, which was a combination of doing both carrier mail and supervising. Appellant indicated that the floors in the employing establishment were concrete and she had been standing on them for 29 years. She reiterated that she sustained her original injury in 1998,[6] when she slipped and fell on steps while delivering mail. Appellant argued that her injury was related to her line of work and the length of time she had performed her duties.

An August 12, 2013 magnetic resonance imaging (MRI) scan and addendum provided by Dr. Joseph, revealed a focal area of subchondaral fibrocystic change within the posterior tibial plafond related to tibiotalar arthrosis. He also noted that the distal tibia was otherwise normal.

OWCP also received copies of prior medical reports.

By decision dated February 9, 2018, OWCP denied modification of its prior decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[7] 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,[8] 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

[6] *Id*.

[7] *Supra* note 2.

[8] *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *Joe D. Cameron*, 41 ECAB 153 (1989).

the employment injury.[9] 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.[10]

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.[11] 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.[12] 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.[13]

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 or her subsequent course of action.[14] The employee has not met his or her burden of proof to establish the occurrence of an injury when there are inconsistencies in the evidence that 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 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.[15]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish an injury in the performance of duty on June 26, 2013, as alleged.

Appellant filed her notice of traumatic injury on November 24, 2014 alleging that she sustained a right ankle and foot injury on June 26, 2013 due to excessive standing and walking. The Board notes that appellant's description of the traumatic incident is imprecise and vague and

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

[10] *R.R.*, Docket No. 19-0048 (issued April 25, 2019); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[11] *R.B.*, Docket No. 17-2014 (issued February 14, 2019); *B.F.*, Docket No. 09-0060 (issued March 17, 2009); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

[12] *S.F.*, Docket No. 18-0296 (issued July 26, 2018); *D.B.*, 58 ECAB 464 (2007); *David Apgar*, 57 ECAB 137 (2005).

[13] *A.D.*, Docket No. 17-1855 (issued February 26, 2018); *C.B.*, Docket No. 08-1583 (issued December 9, 2008); *D.G.*, 59 ECAB 734 (2008); *Bonnie A. Contreras*, *supra* note 11.

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

[15] *See M.C.*, Docket No. 18-1278 (issued March 7, 2019); *D.B.*, *supra* note 12.

fails to provide any specific detail or evidence establishing that the June 26, 2013 incident occurred as alleged.[16] Appellant described in detail her right foot and ankle condition as of August 3, 2013, but she did not describe her condition as of June 26, 2013. She did not submit medical evidence contemporaneous to the alleged June 2013 incident.[17] The surrounding facts and circumstances and appellant's subsequent course of action do not establish that an employment incident occurred on June 26, 2013 as alleged.[18]

On December 3, 2014 OWCP informed appellant that the evidence received to date was insufficient to establish that an incident occurred as alleged on June 26, 2013. Appellant was asked to respond to its factual development questionnaire and provide a detailed description of the alleged employment incident she believed caused her injury. She provided a response that included her complete employment history and all of her work duties since she began working at the employing establishment. Appellant also attributed her conditions to her prior ankle injury from 1997. However, she did not specifically describe any specific incident that occurred on June 26, 2013. OWCP properly advised appellant that, while she may have grounds for an occupational disease claim, she had not provided sufficient evidence to establish that a June 26, 2013 employment incident occurred as alleged.

The Board therefore finds that appellant has not established that an employment incident occurred on June 26, 2013 as alleged. Consequently, it is unnecessary to address the medical evidence of record.[19]

On appeal counsel argues that the claim should have been developed as a claim for occupational disease. Appellant has already clarified that she was alleging a traumatic injury.

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 her burden of proof to establish an injury in the performance of duty on June 26, 2013, as alleged.

[16] *W.C.*, Docket No. 18-1651 (issued March 7, 2019); *see also C.M.*, Docket No. 17-0627 (issued June 28, 2017).

[17] *Supra* note. 12.

[18] *Id.*

[19] *J.C.*, Docket No. 19-0542 (issued August 14, 2019); *see M.P.*, Docket No. 15-0952 (issued July 23, 2015); *Alvin V. Gadd*, 57 ECAB 172 (2005).

ORDER

IT IS HEREBY ORDERED THAT the February 9, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 29, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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