United States Department of Labor
Employees' Compensation Appeals Board

R.B., Appellant	)	
and	)	**Docket No. 19-1026**
	)	**Issued: January 14, 2020**
DEPARTMENT OF HOMELAND SECURITY, CUSTOMS & BORDER PATROL, Washington, DC, 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
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 10, 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 her burden of proof to establish an injury in the performance of duty on March 22, 2018, as alleged.

FACTUAL HISTORY

On April 2, 2018 appellant, then a 47-year-old deputy executive director, filed a traumatic injury claim (Form CA-1) alleging on March 22, 2018 at 7:30 p.m. she fell due to the poor quality of the street or sidewalk in New Orleans, Louisiana, and hit the right side of her head in two places sustaining a concussion while in the performance of duty. On the reverse of the form, appellant's supervisor, R.M., indicated by checking a box marked "yes" that "the injury was caused by the employee's willful misconduct, intoxication, or intent to injury self or another." He noted "witnesses concluded in their written statements" that appellant was intoxicated. R.M. also reported that appellant's allegation of a head injury was contradicted by witnesses' statements which indicated that appellant fell and landed on her knees. R.M. further noted that appellant was on temporary duty (TDY) in travel status which ended at 4:00 p.m. on March 22, 2018. He also reported that the injury occurred off the employing establishment premises and while she was not engaged in official off-premises duties.

In an April 9, 2018 statement, R.M. indicated that he was in New Orleans at the time of appellant's injury, but did not witness her fall. He disputed that appellant was in the performance of duty at the time of her fall, alleging that the official meeting ended at 4:00 p.m. and that the 70 employees who attended the meeting were released at that time. However, R.M. also noted that there were two nonmandatory planned evening dinner/entertainment venues that employees had the option of attending, first socializing at a pub at 6:00 p.m. and then dinner at a restaurant. R.M. noted that these venues were less than a mile from the duty location and the hotel. He also provided seven unsigned and unidentified witness statements, regarding events occurring during the evening of March 22, 2018 involving appellant. None of the statements related witnessing appellant strike her head.

A partially redacted statement entitled "formal statement of events" indicated that on March 22, 2018 appellant organized a gathering at a pub for happy hour at 5:00 p.m. The witness arrived at the pub at approximately 7:00 p.m. and found appellant seated at a table with a cocktail and alleged that her speech was impaired and she appeared intoxicated. She was noted to be unsteady on her feet and walking very slowly on the way to the restaurant. Appellant tripped on a small step in front of a store, fell, and landed on her knees. The witness did not see her hit her head and only saw her fall on her knees. Appellant continued to the restaurant, but after arriving felt ill. The witness went to appellant's hotel room at approximately 8:30 p.m. and found that she had vomited a large amount of liquid and that she sat on the bathroom floor and dry heaved. The witness observed that appellant's knee was swollen and bruised. She also reported that appellant was prediabetic and the witness provided her with orange juice. The witness noted that on March 26, 2018 she indicated that she had been diagnosed with a concussion. She indicated that appellant was glad to know that her condition on March 22, 2018 was not from being drunk, but from the effects of a concussion.

In an April 24, 2018 development letter, OWCP advised appellant of the deficiencies of her claim. It requested additional factual and medical evidence from her and provided a questionnaire for her completion. OWCP afforded appellant 30 days to respond.

In a March 24, 2018 e-mail, appellant reported that she tripped and fell in New Orleans and thought that she had just hit her knee. She noted that no one had seen her fall and that witnesses thought she was just sitting on the curb. Appellant alleged that a concussion explained why she went from being fine and ordering dinner to so sick even after only two drinks. She alleged that alcohol had nothing to do with her symptoms.

In a March 24, 2018 discharge note, Kelly Phillips, a physician assistant, diagnosed head injury and concussion.

On March 29, 2018 appellant underwent a computerized tomography (CT) scan which was read as normal. Dr. Suzanne Wittig, a Board-certified internist, diagnosed postconcussive syndrome on March 29, 2018. On April 2 and 10, 2018 Dr. Melissa N. Womble, a neuropsychologist, examined appellant, diagnosed concussion on March 22, 2018 and provided work restrictions. On April 2, 2018 Dr. Jessica A. Wertz, an osteopath, diagnosed concussion without loss of consciousness.

In an e-mail dated March 22, 2019, R.M., noted that employees would get together at a restaurant at 7:00 p.m. and at a pub at 6:00 p.m. prior to dinner. He noted that he would be at both venues and requested that all "engage, connect, and attend at least one or both."

In a May 9, 2018 note, Dr. Womble reported that appellant had sustained a head injury on March 22, 2018. She listed appellant's symptoms as nausea, vomiting once a day, headaches, dizziness, noise sensitivity, and fatigue. Appellant also exhibited cognitive symptoms including word finding problems and emotional changes of heightened anxiety. On May 18, 2018 Dr. Wittig diagnosed prediabetes and noted that she had been prescribed medication.

By decision dated June 7, 2018, OWCP denied appellant's traumatic injury claim finding that the evidence of record was insufficient to establish that the alleged employment event occurred as she described. While it noted that witnesses had alleged that appellant was intoxicated, it denied her claim because no one saw her hit her head or heard her complain of a head injury. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On June 14, 2018 appellant, through counsel, requested an oral hearing before an OWCP hearing representative. Appellant provided a May 13, 2018 note from Dr. Womble indicating that appellant sustained a head injury on March 22, 2018. She noted that appellant had sustained additional falls and hit the front of her head.

On November 14, 2018 appellant testified before OWCP's hearing representative and noted that she was in New Orleans, Louisiana, for a multiday conference. She left a pub, the after-hours offsite scheduled by her supervisor, and was on her way to dinner at approximately 7:30 p.m. when she fell. Appellant further testified that she had two and a half cocktails at the pub. She did not have an exact recollection of the fall, but noted that coworkers walking in front of her directed her to watch for concrete building molding. Appellant then fell. She also testified that

she definitely hit her knee very hard on the ground, but did not recall hitting her head. Appellant asserted, however, that hitting her head was consistent with how she felt later that night, then the next day, and when she went to the emergency room. Coworkers helped her from the ground and she continued to the restaurant. Appellant did not eat dinner, but returned to her hotel room and was vomiting. She informed her coworkers that she was prediabetic and was provided with orange juice which improved her condition. Appellant related that she had a bump on her head on the right temple lobe and a bruise on her knee. She sought medical treatment on March 24, 2018 and was diagnosed with a concussion. Appellant denied that she was intoxicated when she left the pub, asserting that she was not feeling well and stopped drinking as she had "identified that something was unusual and something was off with me." She noted that she had recently started a new medication, for her diabetes as well as sustaining a reaction to the two cocktails. Appellant testified that her condition improved after drinking orange juice, but that the next day her head hurt where she had hit it.

On November 27, 2018 appellant provided additional medical records from Ms. Kelly dated March 24, 2018 which found a right-sided head injury from a fall which was tender to the touch. Appellant indicated that she was walking down the street in New Orleans, Louisiana, and fell to the ground hitting the right side of her head on the pavement. She noted that she had two alcoholic beverages prior to the fall, but did not feel intoxicated. Appellant attributed her difficulty remembering the details of the fall to her head injury rather than to alcohol consumption. She also had left knee bruising. Appellant continued to feel slightly dizzy, nauseous, and very tired, but had no persistent vomiting.

By decision dated January 28, 2019, OWCP's hearing representative found that the factual evidence was insufficient to establish that appellant had hit her head when she fell on March 22, 2018 and that she therefore had not established an injury at the time, place, and in the manner alleged as there were inconsistencies in the evidence so as to cast serious doubt on the validity of the claim.

LEGAL PRECEDENT

An employee seeking benefits under FECA[3] 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,[4] 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

[3] *Supra* note 2.

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

to the employment injury.[5] 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.[6]

To determine whether an employee 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, 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.[8]

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.[9] 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.[10] 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.[11] 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.[12]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish an injury in the performance of duty on March 22, 2018, as alleged.

Appellant has not established the factual component of her claim as she has not sufficiently explained how and when the claimed injury occurred. In her Form CA-1, she alleged that on March 22, 2018 at 7:30 p.m. she fell due to the poor quality of the street or sidewalk in New Orleans, Louisiana, and believed that she had hit the right side of her head in two places sustaining a concussion. However, in a March 24, 2018 e-mail, appellant reported that she tripped and fell

[5] *C.B.*, Docket No. 18-0071 (issued May 13, 2019); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[6] *D.B.*, Docket No. 18-1348 (issued January 4, 2019); *T.H.*, 59 ECAB 388, 393-94 (2008).

[7] *R.E.*, Docket No. 17-0547 (issued November 13, 2018); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[8] *D.C.*, Docket No. 18-1664 (issued April 1, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

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

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

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

[12] *C.W.*, Docket No. 19-0754 (issued October 2, 2019); *Charles B. Ward*, 38 ECAB 667, 67-71 (1987).

and thought that she had just hit her knee. She specifically noted that she was uncertain whether she had hit her head when she fell. In a statement, allegedly from a witnesses who saw the fall, it is noted that appellant tripped on a small step in front of a store, fell, and landed on her knees. This witness did not see appellant hit her head. Three witnesses reported that after the fall, appellant complained of her knee pain and that they observed swelling, bruising, and other knee conditions. No witnesses supported appellant's contention that she had hit her head when she fell on March 22, 2018, that she complained of head pain after the fall on March 22, 2018, or that there was bruising on her head after the fall on March 22, 2018. The first indication of a head injury was appellant's March 24, 2018 e-mail and medical treatment. As noted, an employee has not met his or her burden of proof where circumstances such as a lack of confirmation of injury cast doubt on an employee's statement in determining whether a *prima facie* case has been established.[13]

In support of her claim, appellant submitted multiple medical records including from Drs. Womble, Wertz, and Wittig diagnosing concussion. On March 24, 2018 Ms. Kelly, a physician assistant,[14] found right-sided head injury which was tender to the touch. While this finding supports that appellant sustained a head injury prior to examination on March 24, 2018, it does not agree with appellant's allegation on her Form CA-1 that she struck her head in two places. The Board finds that these medical records are insufficiently detailed to meet appellant's burden of proof to establish the factual basis of her claim.[15]

As appellant has not adequately responded to the request for factual information, the Board finds that the record lacks sufficient factual evidence to establish specific details of how the claimed injury occurred.[16]

The Board notes that, because appellant has not established the first component of fact of injury, it is unnecessary to discuss whether she submitted medical evidence sufficient to establish that a medical condition existed and whether the condition was causally related to an alleged employment incident.[17]

[13] *E.C.*, Docket No. 19-0943 (issued September 23, 2019).

[14] 5 U.S.C. § 8101(2) provides that a physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law. *See id.* at § 8101(2); *P.H.*, Docket No. 19-0119 (issued July 5, 2019); *T.K.*, Docket No. 19-0055 (issued May 2, 2019); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as nurses, physician assistants, and physical therapists are not competent to render a medical opinion under FECA). *See also Gloria J. McPherson*, 51 ECAB 441 (2000); *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (a medical issue such as causal relationship can only be resolved through the submission of probative medical evidence from a physician).

[15] *Id.*; *K.M.*, Docket No. 19-0367 (issued June 26, 2019).

[16] *M.S.*, Docket No. 18-0059 (issued June 12, 2019); *L.A.*, Docket No. 17-0138 (issued April 5, 2017); *John R. Black*, 49 ECAB 624 (1998); *Judy Bryant*, 40 ECAB 207 (1988); *Martha G. List*, 26 ECAB 200 (1974).

[17] *M.S.*, *id.*; *see R.L.*, Docket No. 17-1670 (issued December 14, 2018); *Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997) (as appellant failed to establish that the claimed incident occurred as alleged, it is unnecessary to discuss the probative value of medical evidence).

On appeal counsel contended that OWCP had not established intoxication as an affirmative defense in the denial of appellant's claim. The Board notes that allegations of intoxication under section 8102(a) of FECA[18] can be invoked only as an affirmative defense and that OWCP's use of an affirmative defense must be invoked in the original adjudication of the claim.[19] It is noted that OWCP did not raise the affirmative defense of intoxication in support of its denial of her claim. It did not mention section 8102(a) of FECA,[20] did not mention its use of an affirmative defense, and did not otherwise discuss intoxication as the basis for the denial of appellant's claim.[21] The basis for the denial of the claim is solely due to appellant's failure to establish fact of injury. Therefore, issue of the affirmative defense of intoxication is irrelevant to the claim as it was not raised by OWCP.[22]

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 March 22, 2018, as alleged.

[18] 5 U.S.C. § 8102(a).

[19] *B.P.*, Docket No. 17-0058 (issued March 12, 2018); *T.F.*, Docket No. 08-1256 (issued November 12, 2008); *Ruth Perras (Charles Perras),* 33 ECAB 1646 (1982).

[20] *Supra* note 15.

[21] OWCP also implicitly accepted that appellant was in the performance of duty on March 22, 2018 as she was in travel status at the time her injury occurred. The Board has held that, where an employee is on travel status or a TDY assignment, he or she is covered by FECA 24 hours a day with respect to any injury that results from activities essential or incidental to his or her temporary assignment. *G.R.*, Docket No. 18-1490 (issued April 4, 2019); *S.T.*, Docket No. 16-1710 (issued September 27, 2017); *T.C.*, Docket No. 16-1070 (issued January 24, 2017).

[22] *Supra* note 17; *I.A.*, Docket No. 15-1931 (issued July 20, 2016); *N.P.*, Docket No. 10-0952 (issued July 26, 2011); *N.P.*, Docket No. 19-0952 (issued May 18, 2011); *A.S.*, Docket No. 10-0514 (issued April 12, 2011); *Patricia McKibben (Jimmy McKibben),* Docket No. 00-0452 (issued June 9, 2000); *Elaine Hegstrom (Wayne R. Hegstrom),* 51 ECAB 539 (2000); *Kurt R. Ellis*, 47 ECAB 505 (1996) (OWCP is required to specifically raise intoxication as an affirmative defense in the original adjudication).

ORDER

IT IS HEREBY ORDERED THAT the January 28, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 14, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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