United States Department of Labor
Employees' Compensation Appeals Board

M.F., Appellant	)	
and	)	**Docket No. 19-0578**
	)	**Issued: January 26, 2021**
DEPARTMENT OF VETERANS AFFAIRS, BIRMINGHAM VETERANS AFFAIRS CENTER, Birmingham, AL, 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 January 17, 2019 appellant filed a timely appeal from a December 19, 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[3]

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[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, following the December 19, 2018 decision, OWCP received additional evidence. 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 has met his burden of proof to establish that a traumatic incident occurred in the performance of duty, as alleged.

FACTUAL HISTORY

On November 6, 2017 appellant, then a 56-year-old police officer, filed a traumatic injury claim (Form CA-1) alleging that on October 27, 2017 he injured his left knee, right elbow, and chest while in the performance of duty. He stated that he was arresting a patient inside the emergency department at the employing establishment during a protect team alarm/call when he hit the concrete two different times, injuring his left knee, right elbow, and causing an incomplete fracture in his chest. Appellant referenced an attached magnetic resonance imaging (MRI) scan and indicated that the incident occurred in "p.m." On the reverse side of the claim form, Officer F.W., assistant police chief at the employing establishment,[4] acknowledged that appellant was injured in the performance of duty at 2:30 p.m. on October 20, 2017 and received medical treatment.

In a November 17, 2017 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence required and afforded him 30 days to submit the requested medical evidence.

In correspondence dated November 20, 2017, T.E., an employing establishment human resources specialist controverted the claim. She submitted a timeline of events regarding appellant's claimed injury, noting that he began working for the employing establishment on June 11, 2017 and on October 23, 2017, Officer F.W. "completed a report describing the details of an incident that occurred on October 20, 2017." T.E. further noted that appellant received medical care on November 2 and 3, 2017, and that he e-mailed his Form CA-1 to her on November 6, 2017. She attached time and attendance records, which indicated that he did not work on October 27, 2017 the date he alleged his injury occurred.

OWCP also received a copy of the October 23, 2017 employing establishment incident report, created by Officer F.W. It documented that on October 20, 2017 appellant was assisting his partner in subduing a patient who was fighting and swinging at both officers in the emergency room when he fell and bruised his left knee and sustained abrasions/scrapes to both arms and his left elbow. Officer F.W. related that the left side of appellant's body was affected, with his left knee being most affected, and both of his arms and/or wrists were also affected.

Medical evidence forwarded by the employing establishment included a note dated November 2, 2017, in which Dr. Gilbert F. Douglas, an osteopath, excused appellant from work from November 2 to 9, 2017. A computerized tomography (CT) scan of the chest of same date demonstrated a deformity of the medial clavicular metaphysis without cortical offset, which could be a deformity related to a previous fracture rather than an incomplete fracture. A curvilinear calcification associated with the sternoclavicular joint/left clavicular head on the left suggested an avulsion type of injury with no dislocation.

[4] Officer F.W. is also identified as W.W. in the case record.

On a November 3, 2017 progress note, Dr. John Young, a Board certified orthopedic surgeon, noted that appellant reported a history that appellant had injured his left knee and elbow, and fractured his sternum during an altercation that occurred "seven days" previously. He described appellant's complaints of significant pain despite being on pain medication, difficulty sleeping, and difficulty bearing weight. Dr. Young reported that x-rays of the right elbow and knee were negative, and that a clavicle x-ray was "somewhat suspicious of a fracture."[5] He noted physical examination findings of good right elbow and left knee range of motion, but that both were tender with no effusion, and ligaments were stable, Dr. Young also noted that appellant's left sternoclavicular joint was tender. He reviewed the chest CT scan and indicated that he thought that there was a small avulsion fracture involving the sternoclavicular joint. Dr. Young diagnosed contusions of the left shoulder, right elbow, and left knee. He recommended an MRI scan of the left knee and stronger pain medication.

On November 6, 2017 the employing establishment executed an authorization for the examination and/or treatment (Form CA-16), which indicated that Dr. Daryl Dykes, a Board-certified orthopedic surgeon, was authorized to examine appellant and report to the employing establishment his opinion on whether the injury was sustained in the performance of duty.

A November 6, 2017 left knee MRI scan demonstrated a probable severe bone contusion of the anterior medial tibial plateau with a smaller bone contusion of the anterior medial femoral condyle.

In a treatment note dated November 15, 2017, Dr. Dykes noted appellant's complaint of right elbow and left knee constant throbbing pain with stiffness and swelling, worse with activity. He reported a history that the injury occurred on October 27, 2017 while appellant was fighting with a veteran, and that he had previous cervical and lumbar surgery. Dr. Dykes described extensive examination findings, but noted that appellant was very touchy. He noted that additional x-rays of the sternum, knee, and elbow were ordered, obtained, and interpreted from an orthopedic standpoint. Dr. Dykes found that right elbow films were fairly unremarkable except for a chronic traction spur at the olecranon tip and what could be a small avulsion injury off the lateral epicondyle, and that sternoclavicular films were fairly unremarkable, but could show some very minimal high riding of the clavicle relative to the sternum medially. He also reviewed diagnostic studies. Dr. Dykes diagnosed a contusion of right front wall of thorax, initial encounter; sprain of ribs, initial encounter; nondisplaced fracture of sternal end of right clavicle, initial encounter for closed fracture; other sprain of right elbow, initial encounter; contusion of left knee, initial encounter; contusion trunk chest; sprain/strain ribs; closed fracture of sternal end of clavicle; sprain/strain elbow, contusion of knee, lower leg left; left sternoclavicular joint avulsion injury; probable chest wall strain versus contusion; status post previous C5-6 anterior cervical fusion; status post previous lumbar fusion at L4-5 with subsequent osteomyelitis; chronic pain management especially as a result of appellant's lumber problems; right elbow contusion/sprain with a fairly benign examination that day; and left knee medial compartment contusion, intra-articular, as confirmed by MRI scan. He recommended physical therapy for the knee and shoulder and protected weight bearing.

Dr. Dykes also completed a work status report that day in which he repeated his diagnoses of contusion of right front wall of thorax, initial encounter; sprain of ribs, initial encounter;

[5] Dr. Young indicated that there was no x-ray of the left knee.

nondisplaced fracture of sternal end of right clavicle, initial encounter for closed fracture; other sprain of right elbow, initial encounter; and contusion of left knee, initial encounter. He provided physical restrictions and advised that appellant could return to modified duties on November 16, 2017. Dr. Dykes concluded that it was indeterminate if appellant's injury was work related.

Hospital emergency department discharge instructions dated November 18, 2017 indicated that appellant had been seen that day by Dr. Jordan Turner, an osteopath, who practices emergency medicine. The discharge diagnosis was fractured sternum.

Emily B. Tidwell, a nurse practitioner, noted that appellant was seen at a clinic on November 21, 2017. She advised that he could return to work on December 26, 2017 with no restrictions.

By decision dated December 28, 2017, OWCP denied appellant's claim, finding that the factual evidence of record was insufficient to establish that the alleged event occurred on October 27, 2017 as described. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On November 9 2018 appellant, through counsel, requested reconsideration. Counsel submitted an October 16, 2018 letter from Dr. James H. Crenshaw, a Board-certified internist, who related that Ms. Tidwell had seen appellant in his office on November 21, 2017 and he had complained of an October 27, 2017 injury when he was trying to subdue a psychiatric patient.

OWCP also received a copy of an e-mail from Q.B., appellant's coworker, to Officer F.W., dated October 20, 2017 at 5:46 p.m. Q.B. wrote that an incident occurred at approximately 2:30 p.m. on that date, both outside and inside the emergency room, involving appellant and a police sergeant. He indicated that appellant hit his left knee both on a cabinet inside the emergency room and on the concrete outside, and that after the incident, appellant also complained of left elbow pain that had some redness and swelling. Q.B. noted that appellant "has a scrape on [appellant's] right elbow that also has a knot the size of a [h]alf-of-dollar coin."

Sharon Love Webster, a nurse at the employing establishment emergency department, provided a voluntary witness statement, dated December 1, 2018. She wrote that, in mid-to-late October, appellant and a police sergeant were injured while assisted with detaining a patient with severe mental health problems. Ms. Love Webster indicated that she provided first aid to both police officers and noted that appellant had a swollen and bleeding knee, bilateral bleeding elbows, and that he complained of shoulder discomfort and tenderness. She advised that she applied bandages and ice packs to reduce the swelling and chest discomfort, and recommended that he stay to be examined by a physician.

By decision dated December 19, 2018, OWCP denied modification of the December 28, 2017 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[6] 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, 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.[7] 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.[8]

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. 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. 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.[9]

An employee's statement 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. The employee's statement, however, must be consistent with the surrounding facts and circumstances and his or her subsequent course of action. 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 serious doubt on an employee's statement in determining whether a *prima facie* case has been established.[11]

ANALYSIS

The Board finds that appellant has met his burden of proof to establish that an incident occurred in the performance of duty on October 20, 2017.

Appellant alleged on his claim form that he injured his left knee, right elbow, and chest while arresting a patient inside the employing establishment's emergency department on a protect team alarm/call. He asserted that he hit the concrete two different times, injuring his left knee, right elbow, and causing an incomplete fracture in his chest. The Board initially finds that, while

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[6] *Supra* note 2.

[7] *D.J.*, Docket No. 19-1301 (issued January 29, 2020); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[8] *Id*.

[9] *F.H.*, Docket No. 18-0869 (issued January 29, 2020).

[10] *K.F.*, Docket No. 18-0485 (issued February 18, 2020); *M.S.*, Docket No. 18-0059 (issued June 12, 2019); *D.B.*, 58 ECAB 464, 466-67 (2007).

[11] *K.F.*, *id*., *D.R.*, Docket No. 19-0072 (issued June 24, 2019).

appellant's claim form lists October 27, 2017 as the date of injury, the evidence of record, including time and attendance records, establishes that he was not at work on October 27, 2017 and that the injury occurred instead on October 20, 2017.

On the reverse side of the claim form, Officer F.W. acknowledged that appellant was injured in the performance of duty at 2:30 p.m. on October 20, 2017. Furthermore, an October 23, 2017 employing establishment incident report, created by Officer F.W documented that on October 20, 2017 appellant was assisting his partner in subduing a patient who was fighting and swinging at both officers in the emergency room when appellant fell and bruised his left knee and sustained abrasions/scrapes to both arms and his left elbow. Officer F.W. related that the left side of appellant's body was affected, with his left knee being most affected, and both arms and/or wrists were also affected.

OWCP also received a copy of an e-mail from Q.B., a coworker, to F.W., dated October 20, 2017 at 5:46 p.m. Q.B. wrote that an incident occurred at approximately 2:30 p.m. on that date, both outside and inside the emergency room, and involved appellant and a police sergeant. He indicated that appellant hit his left knee both on a cabinet inside the emergency room and on the concrete outside, and that, after the incident, appellant also complained of left elbow pain that had some redness and swelling.

Ms. Love Webster also provided a voluntary witness statement, dated December 1, 2018. She wrote that, in mid-to-late October, appellant and a police sergeant were injured while assisted with detaining a patient with severe mental health problems. Ms. Love Webster indicated that she provided first aid to both police officers and noted that appellant had a swollen and bleeding knee, bilateral bleeding elbows, and that he complained of shoulder discomfort and tenderness. She advised that she applied bandages and ice packs to reduce the swelling and chest discomfort, and recommended that he stay to be examined by a physician.

The injury appellant claimed is, therefore, consistent with the facts and circumstances he set forth in his claim form, his course of action, and the medical evidence he submitted. Further, the history of the employment injury was confirmed by the employing establishment, witnesses, and medical reports. The Board thus finds that appellant has met his burden of proof to establish that the October 20, 2017 employment incident occurred in the performance of duty, as alleged.[12]

As appellant has established that the October 20, 2017 employment incident factually occurred as alleged, the question becomes whether the incident caused an injury.[13] While OWCP found that he had not established fact of injury, it did not evaluate the medical evidence. The Board will, therefore, set aside OWCP's December 19, 2018 decision and remand the case for consideration of the medical evidence of record.[14] After any further development deemed necessary, OWCP shall issue a *de novo* decision addressing whether appellant has met his burden

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[12] *See M.H.*, Docket No, 20-0576 (issued August 6, 2020); *M.A.*, Docket No. 19-0616 (issued April 10, 2020); *C.M.*, Docket No. 19-0009 (issued May 24, 2019).

[13] *Id.*

[14] On remand, OWCP shall apply its procedures pertaining to visible injuries with regard to appellant's claimed contusions, abrasions, lacerations, and/or swelling. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, Chapter 2.800.6(a) (June 2011); *id.* at Chapter 2.805.3(c) (January 2013).

of proof to establish an injury causally related to the accepted October 20, 2017 employment incident.

CONCLUSION

The Board finds that appellant has met his burden of proof to establish that the October 20, 2017 employment incident occurred in the performance of duty. The Board further finds that the case is not in posture for decision regarding whether he has established an injury causally related to the accepted employment incident.[15]

ORDER

IT IS HEREBY ORDERED THAT the December 19, 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: January 26, 2021
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

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[15] The Board notes that the employing establishment issued a Form CA-16, dated November 6, 2017. 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).