

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

_____)
B.P., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS HEALTH ADMINISTRATION,)
North Little Rock, AR, Employer)
_____)

Docket No. 21-0299
Issued: October 6, 2022

Appearances:
Appellant, pro se
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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 23, 2020 appellant filed a timely appeal from an October 26, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the October 26, 2020 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 an injury in the performance of duty on January 6, 2016, as alleged.

FACTUAL HISTORY

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

On January 8, 2016 appellant, then a 54-year-old supervisory contract specialist, filed a traumatic injury claim (Form CA-1) alleging that he was injured when he slipped while descending stairs at 3:30 p.m. on January 6, 2016 in the performance of duty. In an attached January 6, 2016 narrative statement, he indicated that he took a few steps down the stairs and slipped on what he claimed was, later found to be, a loose stair tread. Coworkers stayed with him until the ambulance arrived. On the reverse side of the claim form, an employing establishment manager raised as an affirmative defense that appellant was intoxicated, noting that appellant had been instructed on January 5, 2016 not to use the stairs without assistance.

E-mail correspondence between appellant and the employing establishment indicates that at 7:15 a.m. on January 6, 2016 appellant again reported difficulty with the stairs. On January 7, 2016 the employing establishment noted his fall the previous day. It instructed appellant that, based on medical documentation received, he should have help with ascending or descending stairs. The employing establishment indicated that appellant could not return to work until medically cleared.

On February 22, 2016 the employing establishment notified OWCP that there was no elevator or escalator available to appellant, that he was offered assistance in navigating the stairs, but that there were no witnesses to the January 6, 2016 fall, other than the driver who was there to pick up appellant. Photographic evidence of the stairs was provided.

Hospital records dated January 6, 2016 noted that appellant was treated by Dr. Danna Grisham, Board-certified in emergency medicine. The January 6, 2016 emergency department records indicate that appellant arrived at 4:32 p.m. and was discharged at 7:43 p.m. Dr. Grisham noted appellant's complaints of dizziness after a fall at work. She related a history that he slid down approximately 15 steps.

In reports dated January 22 and 29, 2016, Dr. Danilo Hoyumpa, Board-certified in family medicine, noted appellant's history of a fall down the stairs. He diagnosed left shoulder strain, cervical strain, and low back strain, and advised that appellant could return to restricted duty, but must work from home due to medications and until seen by an orthopedist.

In a February 13, 2016 report, Dr. Hoyumpa noted that appellant was seen on January 22, 2016 for a January 6, 2016 employment injury when he fell down stairs while carrying a back

³ Docket No. 17-0580 (issued March 12, 2018).

pack, injuring his left shoulder, neck, and lower back. He also noted that appellant was taking pain medication. Dr. Hoyumpa diagnosed strains of the left upper extremity and neck and low back pain, all improved. He advised that appellant should remain off work, noting that his medication caused drowsiness. OWCP continued to receive medical reports, including chiropractic reports related to his continuing medical treatment.

In a February 22, 2016 statement, D.M., an employing establishment official, indicated that he was notified of the January 6, 2016 incident by a coworker, who informed him that several people heard a loud noise coming from the direction of the stairwell. The coworker also indicated that the only person who might have witnessed the fall was the person who was there to pick up appellant.

In a February 22, 2016 statement, A.R., another employing establishment official, indicated that there were no witnesses to appellant's fall.

By decision dated March 9, 2016, OWCP denied appellant's claim, finding that intoxication was the proximate cause of his fall.

Appellant, through counsel, timely requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. He submitted additional evidence.

In a March 28, 2016 note, Stephanie Fraser, a nurse practitioner, related that appellant, who had a left shoulder injury, slipped down some stairs while at work.

Appellant also submitted diagnostic tests and medical evidence that predated the January 6, 2016 injury.

A hearing was held on November 8, 2016, during which appellant testified as to the events of January 6, 2016. Appellant testified that his attendant, E.K., came to his office and walked in front of him as he went down the stairs. He stated that he was leaving for the day, he picked up his backpack, took a few steps and slid almost to the landing. Appellant noted that the building had no elevator and the employing establishment would not give him a first-floor office. He related that coworkers helped him sit up until he was taken to an emergency room.

By decision dated January 9, 2017, OWCP's hearing representative affirmed the March 9, 2016 decision, finding that appellant's fall on January 6, 2016 was caused by narcotic intoxication.

Appellant timely filed an appeal to the Board. By decision dated March 12, 2018, the Board set aside OWCP's January 9, 2017 decision, finding that the evidence of record was insufficient to meet OWCP's burden of proof to establish the affirmative defense of narcotic intoxication. The Board remanded the case for further development to obtain a witness statement from E.K. to determine a proper description of his fall.

OWCP continued to receive additional evidence, photographs of the stairwell where appellant's fall allegedly occurred. A January 6, 2016 emergency medical services report noted that an ambulance arrived at 3:57 p.m. for a reported fall down stairs. Appellant related that he tripped and fell down a flight of stairs with no loss of consciousness. No other complaints or

obvious trauma were noted. Appellant was ambulatory after the fall and transported without incident.

In a March 25, 2018 statement, appellant's attendant, E.K., noted that she helped him get ready for work and helped him into and out of the car on January 6, 2016. E.K. described the employing establishment stairs as steep and narrow and indicated that appellant lost his balance going up the stairs that morning, as he did the previous morning. At approximately 3:30 p.m., she arrived at appellant's office to pick him up. Appellant placed his computer into his backpack and stopped at the water fountain outside his office. E.K. indicated that she proceeded down the stairs ahead of appellant, and as she got to the bottom of the stairs she looked back and saw that he had slipped and fallen down the stairs. When he came to a stop, she asked if he was okay, and he told her that his back and shoulder hurt. E.K. indicated that coworkers in the surrounding offices came out to assist him. Approximately 15 to 20 minutes after the fall, the ambulance came and transported him to the emergency room. E.K. asserted that the stairs to appellant's office were too narrow and steep for two people to ascend or descend side-by-side.

In an April 24, 2018 development letter, OWCP requested additional factual and medical evidence from appellant. In an April 30, 2018 response, appellant indicated that he believed D.M. had submitted a safety or maintenance request related to the loose treading on January 7, 2016.

OWCP requested that the employing establishment reply to appellant's April 30, 2018 statement regarding a loose stair tread.

In a May 20, 2018 response, H.H., indicated that the maintenance history for the building that appellant worked showed no maintenance work related to the stairs for the year 2016. A copy of the electronic work requests was attached. H.H. noted that D.M. did not confirm that the stair tread was loose. He related that several coworkers heard noise from the fall, but no one witnessed the fall. H.H. noted that, according to D.M.'s statement, coworker, B.T. came to appellant's aid after the fall as she did not want him sitting there alone after the incident. He indicated that B.T. had since retired and they were unable to reach her to obtain a witness statement.

In a May 8, 2018 e-mail, A.R. contended that on January 6, 2015, appellant's attendant did not enter the building as far as anyone witnessed. There were also no direct witnesses to appellant's incident. A.R. also indicated that appellant had been approved for leave through January 15, 2016, but returned to work on his own accord on January 4, 2016. He indicated that he had told appellant that he needed to seek assistance going up and down the stairs until his reasonable accommodation request had been finalized.

OWCP received a January 6, 2016 e-mail, wherein D.M. indicated that he "heard a loud thud" outside of his office at approximately 3:30 p.m. B.T. called him at approximately 3:35 p.m. and related that an employee had fallen down the stairs. He went to the stairs and saw appellant sitting on the stairs, leaning against the handrails. D.M. noted that several people heard the noise but no one witnessed the fall.

By *de novo* decision dated June 1, 2018, OWCP denied appellant's claim finding that inconsistencies regarding the circumstances of his injury were sufficient to cast serious doubt that his fall occurred as alleged.

On May 29, 2019 appellant, through counsel, requested reconsideration.

A work order dated January 7, 2016 was received which reflected that a vinyl covering on a stairwell needed maintenance. The work order was assigned on January 7, 2016 and completed by the carpentry shop on February 12, 2016. A second work order dated March 15, 2016 indicated that an employee had fallen down stairs, the stairs were inspected and the carpentry shop reglued the 2nd and 3rd stairs from the top.

In a February 11, 2019 statement, E.K. reiterated that she was at the bottom of the stairs on the first floor when she heard a loud tumbling noise behind her and, when she turned, she noticed that appellant was sliding down the steps. She indicated that when she took appellant into work the next morning, she noticed that the plastic cover on the top of the stairs was loose and thought that maybe that was the reason why appellant had slipped and fallen.

By decision dated August 13, 2019, OWCP denied modification of its June 1, 2018 decision.

On August 11, 2020 appellant, through counsel, again requested reconsideration contending that appellant has established his claim. Counsel advised that appellant fell on a loose stair tread approximately three steps down from the top. He further advised that E.K. witnessed the fall and attributed it to a loose tread on the stairwell.

In an undated statement, K.A., a coworker, indicated that he saw several staff aid appellant in what looked like an injury at the bottom of the stairs. He indicated that the stairs where the incident occurred were steep and narrow and not in compliance with disability standards. The following day, K.A. noted that there was a sign instructing, “Be careful on steps.”

In a June 22, 2020 statement, J.S., a coworker, indicated that the building where appellant fell is an old military barrack, that the stairs where appellant fell were narrow, and that only one person could go up or down those stairs at any given time. She noted that each stair step/landing had black rubber covering with round circles. J.S. recalled seeing a typed sign stating, “‘watch your step’ or something to that verbiage was placed on the stairwell wall” shortly after appellant’s incident on the stairs.

By decision dated October 26, 2020, OWCP denied modification of its August 13, 2019 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ has the burden of proof to establish the essential elements of his or her claim, including 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,⁵ that an injury was sustained in the performance of duty as alleged, and that

⁴ *Supra* note 1.

⁵ *F.H.*, Docket No.18-0869 (issued January 29, 2020); *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *Joe D. Cameron*, 41 ECAB 153 (1989).

any disability or medical 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 upon 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 first must be determined whether fact of injury has been established. There are two components involved in establishing fact of injury. The first component is that the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time and place, and in the manner alleged. The second component is whether the employment incident caused a personal injury and can be established only by medical evidence.⁸

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.⁹ The employee has not met his or her burden of proof of establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.¹⁰ 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 serious doubt on an employee's statements in determining whether a case has been established. 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

ANALYSIS

The Board finds that appellant has met his burden of proof to establish an incident in the performance of duty on January 6, 2016, as alleged.

Preliminary, the Board notes that, in its March 12, 2018 decision, it found that OWCP failed to meet its burden of proof to establish the affirmative defense that narcotic intoxication was

⁶ *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁷ *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁸ *T.H.*, Docket No. 19-0599 (issued January 28, 2020); *K.L.*, Docket No. 18-1029 (issued January 9, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

⁹ *See J.M.*, Docket No. 19-1024 (issued October 18, 2019); *M.F.*, Docket No. 18-1162 (issued April 9, 2019).

¹⁰ *See V.J.*, Docket No. 19-1600 (issued March 13, 2020); *E.C.*, Docket No. 19-0943 (issued September 23, 2019).

¹¹ *See M.C.*, Docket No. 18-1278 (issued March 7, 2019); *D.B.*, 58 ECAB 464, 466-67 (2007).

the proximate cause of appellant's fall. Findings made in prior Board decisions are *res judicata* absent further review by OWCP under section 8128 of FECA.¹²

Appellant alleged on his Form CA-1 that he was injured when he slipped while descending stairs at 3:30 p.m. on January 6, 2016 in the performance of duty. In an attached January 6, 2016 narrative statement, he indicated that he took a few steps down the stairs and slipped on a loose stair tread. Coworkers stayed with him until the ambulance arrived. The January 6, 2016 emergency department records indicate that appellant arrived at 4:32 p.m. and was discharged at 7:43 p.m. Dr. Grisham noted appellant's complaints of dizziness after a fall at work. She related a history that he slid down approximately 15 steps. Multiple additional medical reports of record consistently related appellant's history of a fall down steps at work on January 6, 2016. Diagnoses included left shoulder strain, cervical strain, and low back strain.

During the oral hearing held on November 8, 2016, appellant testified that on January 6, 2016 his attendant, E.K., came to his office and walked in front of him as he went down the stairs to leave for the day. He explained that he picked up his backpack, took a few steps, and slid almost to the landing. Appellant noted that the building had no elevator, and the employing establishment would not give him a first-floor office. He related that coworkers helped him sit up until he was taken to an emergency room.

A January 6, 2016 emergency medical services report noted that an ambulance arrived at 3:57 p.m. for a reported fall down stairs. Appellant related that he had tripped and fallen down one flight of stairs with no loss of consciousness. No other complaints or obvious trauma were noted.

The case record indicates that multiple witnesses heard a sound coming from the stairwell at the time of appellant's fall and witnesses who then reported to the stairwell found appellant sitting at the bottom of the stairs. Appellant's attendant, E.K., who other witnesses confirmed was present in the stairwell when appellant fell, submitted statements consistently noting that she was at the bottom of the stairs on the first floor when she heard a loud tumbling noise behind her and, when she turned, she noticed that appellant was sliding down the steps. She also indicated that when she took appellant into work the next morning, she noticed that the plastic cover on the top of the stairs was loose and thought that was the cause of appellant's fall.

The case record also establishes that work orders contemporaneous to appellant's fall were received confirming that maintenance was required and performed on a stairwell immediately after appellant's January 6, 2016 fall. A work order dated January 7, 2016 reflected that a vinyl covering on a stairwell needed maintenance. The work order was assigned on January 7, 2016 and completed by the carpentry shop on February 12, 2016. A second work order dated March 15, 2016 indicated that an employee had fallen down the stairs, the stairs were inspected, and the carpentry shop reglued the 2nd and 3rd stairs from the top. In an undated statement, K.A., a coworker, indicated that he saw several staff aid appellant in what looked like an injury at the bottom of the stairs. He indicated that the stairs where the incident occurred were steep and narrow and not in compliance with disability standards. The following day, K.A. noted that there was a

¹² See *P.B.*, Docket No. 20-0124 (issued March 10, 2021); *I.S.*, Docket No. 19-1461 (issued April 30, 2020); *Clinton E. Anthony, Jr.*, 49 ECAB 476, 479 (1998).

sign instructing, “Be careful on steps.” In a June 22, 2020 statement, J.S., a coworker, indicated that the building where appellant fell is an old military barrack, that, the stairs where appellant fell were narrow, and that only one person could go up or down those stairs at any given time. She noted that each stair step/landing had black rubber covering with round circles. J.S. recalled seeing a typed sign stating, “‘watch your step’ or something to that verbiage was placed on the stairwell wall” shortly after appellant’s incident on the stairs.

Appellant has provided a consistent account of the time, place, and manner of the alleged injury, which is supported by the evidence of record. The Board thus finds that he has met his burden of proof to establish an employment incident in the performance of duty on January 6, 2016, as alleged.

As appellant has established that the January 6, 2016 employment incident factually occurred as alleged, the question becomes whether the incident caused an injury.¹³ As OWCP found that he had not established fact of injury, it has not evaluated the medical evidence. The Board will, therefore, set aside OWCP’s October 26, 2020 decision and remand the case for consideration of the medical evidence of record.¹⁴ After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that appellant has met his burden of proof to establish an incident in the performance of duty on January 6, 2016, as alleged. The Board further finds that the case is not in posture for decision regarding whether he has established an injury causally related to the January 6, 2016 accepted employment incident.

¹³ 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).

¹⁴ *M.H.*, *id.*; *S.M.*, Docket No. 16-0875 (issued December 12, 2017).

ORDER

IT IS HEREBY ORDERED THAT the October 26, 2020 decision of the Office of Workers' Compensation Programs is reversed in part and set aside in part, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: October 6, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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