

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

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<b>M.D., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 22-0450</b>
	)	<b>Issued: October 20, 2022</b>
<b>U.S. POSTAL SERVICE, POST OFFICE,</b>	)	
<b>Louisville, KY, Employer</b>	)	
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*Appearances:*  
Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On February 1, 2022 appellant, through counsel, filed a timely appeal from a January 5, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## ISSUE

The issue is whether appellant has met her burden of proof to establish a traumatic injury in the performance of duty on September 30, 2019, as alleged.

## FACTUAL HISTORY

On January 14, 2021 appellant, then a 29-year-old carrier technician, filed a traumatic injury claim (Form CA-1) alleging that on September 30, 2019 she twisted her left ankle when she stepped out of her vehicle to deliver to a business while in the performance of duty. She explained that her foot slipped into a crack in the driveway and got stuck. On the reverse side of the claim form, her supervisor, A.P., acknowledged that appellant was injured in the performance of duty and that her knowledge of the facts agreed with appellant's statement. Appellant did not stop work.

In a January 15, 2021 development letter, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of evidence required and provided a questionnaire for her completion. OWCP afforded appellant 30 days to respond.

OWCP subsequently received an October 14, 2019 progress note from Nancy E. Allen, an advanced practice registered nurse (APRN), noting that appellant wore a left ankle brace and continued to have ankle tenderness with swelling when walking. Ms. Allen's examination of the left lower extremity revealed tenderness laterally with inversion of the foot. She diagnosed sprain of other ligaments of the left ankle.

In progress reports dated November 11 and December 27, 2019, Ms. Allen related that appellant's ankle was improving "since she ha[d] not been carr[y]ing mail like she was." In the November 11, 2019 report, she noted that appellant was wearing a left ankle brace, and her examination of the left foot and ankle revealed tenderness laterally with inversion of the foot. In a January 16, 2020 report, Ms. Allen related that appellant's ankle was stable and that she was not walking her mail carrier route.

Progress notes from Dr. Russell McKinley, a podiatrist, dated April 9 and 13, 2020 related that appellant worked at the employing establishment and sustained an acute left ankle sprain while at work in April 2019, which was slowly worsening. Appellant explained that she did not report the injury because she was worried that she would be fired if she did. Dr. McKinley's examination of the left ankle and foot revealed tenderness throughout the ankle joint with palpation and range of motion. In the April 9, 2020 report, he diagnosed left foot pain and primary osteoarthritis of the left ankle and foot. In the April 13, 2020 report, Dr. McKinley reviewed an April 10, 2020 magnetic resonance imaging (MRI) scan of the left ankle, which revealed a cystic focus in the subcutaneous tissues overlying the lateral cuboid, favored to represent a small ganglion, but with synovial cyst or adventitial bursa also in the differential. He diagnosed left foot pain, ganglion cyst of the left foot, and ganglion of the left ankle and foot.

In an April 16, 2020 report, Dr. Keith W. Myrick, a podiatrist, related that appellant sustained a left ankle sprain or strain at work "on October 2019" when she fell on an uneven pavement, caught herself, and her left ankle turned outward. Appellant reported that her

symptoms, including swelling and pain in the left posterior ankle, began immediately after the injury. Dr. Myrick related appellant's history of treatment. His examination of the left ankle and foot revealed moderate tenderness to palpation, a left non-mobile mass in the ankle, tender sinus tarsi, and instability. Dr. Myrick diagnosed soft tissue mass, dislocation of tarsal joint, ligament tear, and tendon tear in ankle and scheduled appellant for surgery.

On April 22, 2020 Dr. Myrick performed left foot excision radical resection soft tissue, neuroplasty, repair of ligament, repair of peroneal tendon, open treatment of joint dislocation, and open treatment of calcaneus fracture.

In a June 5, 2020 postoperative examination report, Dr. Myrick noted that his examination of the left lower extremity was appropriate for the postoperative course. He diagnosed dislocation of tarsal joint, ligament tear, and tendon tear in the ankle and advised that appellant could bear weight as tolerated.

A work restriction note dated July 23, 2020 bearing an illegible signature indicated that appellant was released for sedentary work and could not walk or bear weight for more than 15 minutes due to foot surgery.

Dr. Myrick noted in a July 31, 2020 report that appellant's symptoms, including nearly constant posterior ankle pain, were unchanged from her last visit on May 7, 2020. His examination of the left ankle and foot revealed moderate tenderness to palpation of the left peroneal tendon. He diagnosed peroneal tendinitis and indicated that appellant was on limited-duty work.

Appellant also submitted a December 30, 2020 report from Dr. Paul Klutts, a podiatrist, who noted that appellant presented with pain and swelling in the left foot and ankle after working. Dr. Klutts examined appellant, noting that she continued to have pain at the surgical site, and diagnosed acquired short Achilles tendon in the left ankle, disorder of ligament in the left ankle, peroneal tendinitis in the left leg, pain in the left ankle and joints of the left foot, difficulty in walking, and localized edema. He opined that appellant had not reached maximum medical improvement (MMI) and recommended that she continue physical therapy. In a January 28, 2021 report, Dr. Klutts noted that appellant had difficulty walking and exercising. His examination revealed continued pain at the surgical site with no further improvement. Dr. Klutts provided the same diagnoses and recommendations as in his previous report.

By decision dated February 23, 2021, OWCP denied appellant's traumatic injury claim, finding that the evidence of record was insufficient to establish that the September 30, 2019 employment incident occurred as alleged. It noted that she had not provided a response to its development questionnaire and had provided an inconsistent history of injury. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

Appellant subsequently submitted an undated response to OWCP's development questionnaire. She explained that on the date of injury she was working a route she did not work frequently. Appellant stated that she was walking back to her long life vehicle (LLV) after delivering mail to a lawyer's office and the parking lot was cracked sporadically throughout. She stepped into a crack, her foot got caught in the cement, and she twisted her left ankle, noting that she put all her weight on the left ankle that was twisting and gained composure by putting her right

foot flat on the ground and limping back to her vehicle. Appellant reiterated that she reported the incident on the day it occurred, but she alleged that her boss pulled her aside and said, “So what are you going to do because if I report this you will get fired; you’re in you[r] 90 days.” She stated that she responded, “okay, I won’t say anything,” because she was scared of losing her job. Appellant noted that she had been very vocal about the incident to coworkers, as well as officers-in-charge (OIC) and postmasters with whom she worked, because she was going through physical therapy and had trouble walking after her first surgery. She noted that immediately after the incident, she began to limp and was in a great deal of pain. However, appellant could not afford to leave work, so she finished her routes and tried over the counter relief. The limp and pain worsened in the following days until her supervisor told her to go to the doctor. Appellant related her history of treatment, noting that she saw Ms. Allen around August 2019 and was then referred to a number of specialists, and stated that she did not sustain any other injury to her ankle after she first received medical attention.

In an undated statement, M.W., a coworker, related that appellant was injured on the job on August 19 by tripping and rolling her ankle while on a city route for the employing establishment. M.W. stated that X.S., appellant’s supervisor at the time, knew she was in a lot of pain and could hardly walk. However, X.S. allegedly told appellant to continue on the route and did not want to report appellant’s injury to OWCP. M.W. alleged that X.S. had a habit of discouraging employees, including himself, from reporting injuries.

An undated statement from T.S., appellant’s mother, related that appellant informed her in August 2019 that she twisted her ankle at work and that she immediately tried to report the injury, but was told she would be fired.

In an undated statement, M.T., a coworker, reported that appellant injured her left ankle in 2019 while working as a city carrier and wore an ankle support for a long period of time in order to perform her work.

An undated statement from J.K., a coworker, related that appellant was delivering on his route when she was injured, after which she confided in him and other coworkers when they commented on her limp. Appellant explained to him that she was hurt on the route while walking back to her LLV and when she reported this to X.S., he told her that she would be fired if the incident was reported. J.K. related that appellant began to limp and wobble more over time until her coworkers urged her to see a doctor because “something was seriously wrong.” Later, when the new OIC, A.P., approached J.K. regarding appellant’s incident, he told her what he knew and informed her that “we all knew about the accident, but it wasn’t reported.”

Appellant also submitted several copies of text messages sent between her and various other individuals with date stamps that do not indicate the year in which they were sent.

In a May 7, 2020 report, Dr. Myrick noted that appellant was experiencing itching and persistent pain two weeks postoperatively, but her symptoms were improving. The examination was appropriate for the postoperative course. He diagnosed soft tissue mass, dislocation of tarsal

joint, ligament tear, and tendon tear in the ankle and noted that appellant had returned to full-duty work. In a June 5, 2020 report, Dr. Myrick provided the same diagnosis.<sup>3</sup>

In a September 10, 2020 report, Dr. Klutts noted that appellant presented with left ankle pain and had had previous surgeries for cyst removal. His examination of the left foot and ankle demonstrated diffuse pain and antalgic gait. Dr. Klutts diagnosed disorder of ligament in the left ankle, peroneal tendinitis in the left leg, pain in left ankle and joints of left foot, difficulty walking, and localized edema.<sup>4</sup> In reports dated September 23, October 21, and December 9, 2020, he diagnosed the same. In the October 21, 2020 report, Dr. Klutts noted that appellant continued to experience pain in her ankle, but that it had improved with physical therapy. On December 9, 2020 he related that appellant felt improvement in her left ankle but at times still felt weakness. Dr. Klutts' examination showed no further improvement of the left foot and ankle and demonstrated slight equinus. He added a diagnosis of acquired short Achilles tendon and opined that appellant had not reached MMI. Dr. Klutts recommended that appellant continue physical therapy and use a night splint.

In a February 5, 2021 report, Dr. Myrick reported that appellant had ankle pain for several months following a specific injury and that the pain had not been improved with immobilization, oral medications, or physical therapy. His examination of the left ankle and foot revealed moderate tenderness to palpation to the left Achilles tendon, palpable bursa, and fusiform swelling in tendon distally. Dr. Myrick diagnosed ligament tear, tendon tear in ankle, bursitis, soft tissue mass, and equinus contracture of ankle. He scheduled appellant for surgery and advised she could bear weight as tolerated with a fracture walker. In a March 4, 2021 postoperative report, Dr. Myrick noted that appellant's symptoms had improved with mild, occasional pain. The examination was appropriate for the postoperative course. Dr. Myrick diagnosed dislocation of tarsal joint, bursitis, soft tissue mass, equinus contracture of ankle, and Achilles tendon rupture. He advised that appellant should be non-weightbearing with a fracture walker.

A March 14, 2021 statement from E.P., a coworker, related that appellant told her she hurt her ankle while delivering mail. In the days that followed, appellant went to the doctor and had to wear a boot for quite some time. E.P. noted that, during that time, appellant discussed her treatment with coworkers and told them that her pain was continuing and possibly worsening.

OWCP also received a March 16, 2021 statement from A.P., appellant's OIC, stating that appellant came to her in January 2021 regarding an ankle injury she had sustained while working at the employing establishment. Appellant told A.P. that, at the time of the injury, she reported the incident to her supervisor and union representative, but that both told her she could be terminated if the accident was reported. A.P. observed appellant's difficulty walking and her permanent limp and was aware that appellant had a second surgery for her ankle in February 2021. She noted that, since the incident, the driveway where appellant had twisted her ankle had been repaired. A.P. concluded, "I believe that if the proper procedures would have been followed[,] she would have healed properly and been able to return to her route by now."

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<sup>3</sup> Appellant underwent an x-ray of the left ankle on September 9, 2020, which revealed no abnormalities.

<sup>4</sup> Appellant underwent an MRI scan of the left ankle on September 17, 2020, which revealed no abnormalities.

In a November 16, 2021 statement, J.S., an acting postmaster for the employing establishment beginning on July 20, 2020, explained that appellant was instructed by C.J., a Manager of Post Office Operations (MPOO), to return to duty station post office to stand and case routes and deliver mail, in violation of her medical restrictions, when that office experienced a COVID-19 event in the summer of 2020. He observed appellant's pain and mobility problems when she returned to his post office due to the stress placed on her ankle.

On November 16, 2021 appellant, through counsel, requested reconsideration. In support of her request, appellant submitted a November 11, 2021 causality examination report by Dr. Sami E. Moufawad, a Board-certified pain-medicine specialist. Dr. Moufawad noted a date of injury of September 30, 2019 and provided a detailed history of injury and treatment. He diagnosed calcaneal fracture, left ankle dislocation at calcaneocuboid joint, ruptured synovium of the calcaneocuboid joint, Achilles tendon partial tear, lateral peroneal tendinitis, and left ankle and foot sprain. Dr. Moufawad also provided a pathophysiological explanation of how appellant's injury, namely her foot becoming anchored in the crack in the concrete and her body twisting against the foot, caused her medical conditions.

OWCP also received an undated statement from G.C., a coworker, relating that C.W. told him that appellant informed X.S. about her injury when it happened and X.S. told her to "forget about it, it was not going to be reported."

By decision dated January 5, 2022, OWCP denied modification of its February 23, 2021 decision.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>5</sup> 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,<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup>

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<sup>5</sup> *Supra* note 2.

<sup>6</sup> *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).

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

<sup>8</sup> *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).

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.<sup>9</sup> Fact of injury consists of two components that must be considered in conjunction with one another. First, 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.<sup>10</sup> Second, the employee must submit sufficient evidence to establish that the employment incident caused a personal injury.<sup>11</sup>

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.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup>

### ANALYSIS

The Board finds that appellant has met her burden of proof to establish a traumatic incident in the performance of duty on September 30, 2019, as alleged.

In her January 14, 2021 Form CA-1, appellant indicated that on September 30, 2019 she twisted her left ankle when she stepped out of her vehicle to deliver to a business while in the performance of duty and her foot slipped into a crack in the driveway. A.P., appellant's supervisor, acknowledged on the claim form that appellant was injured in the performance of duty and that her knowledge of the history was in accord with the statement appellant provided. As well, the history of the claimed left ankle injury reported by Dr. Myrick in his April 16, 2020 report is consistent with appellant's description of injury.<sup>15</sup> Moreover, Dr. Moufawad included a September 30, 2019 date of injury in his November 11, 2021 report and his description of the

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<sup>9</sup> *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *T.H.*, 59 ECAB 388, 393-94 (2008).

<sup>10</sup> *L.T.*, Docket No. 18-1603 (issued February 21, 2019); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>11</sup> *B.M.*, Docket No. 17-0796 (issued July 5, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

<sup>12</sup> *M.F.*, Docket No. 18-1162 (issued April 9, 2019); *Charles B. Ward*, 38 ECAB 667, 67-71 (1987).

<sup>13</sup> *L.D.*, Docket No. 16-0199 (issued March 8, 2016); *Betty J. Smith*, 54 ECAB 174 (2002).

<sup>14</sup> *See M.C.*, Docket No. 18-1278 (issued March 7, 2019); *D.B.*, 58 ECAB 464, 466-67 (2007).

<sup>15</sup> Although Dr. Myrick reported that the injury occurred "on October 2019," this date is not inconsistent with appellant's claimed date of injury so as to cast serious doubt upon the validity of the claim. *See generally, Kelly J. Butler*, Docket No. 98-2443 (issued June 2, 2000).

injury was consistent with that of appellant's. The evidence establishes that the incident occurred at the time and place, and in the manner alleged. Therefore, the Board finds that appellant has met her burden of proof to establish that a traumatic incident occurred in the performance of duty on September 30, 2019, as alleged.

As appellant has established that an incident occurred in the performance of duty on September 30, 2019, as alleged, the question becomes whether the incident caused an injury.<sup>16</sup> As OWCP found that he had not established fact of injury, it did not evaluate the medical evidence. The case must, therefore, be remanded for consideration of the medical evidence of record.<sup>17</sup> After such further development as deemed necessary, OWCP shall issue a *de novo* decision addressing whether appellant has met her burden of proof to establish an injury causally related to the accepted September 30, 2019 employment incident, and any attendant disability.

### CONCLUSION

The Board finds that appellant has met her burden of proof to establish a traumatic incident in the performance of duty on September 30, 2019, as alleged. The Board further finds that this case is not in posture for decision regarding whether she has established an injury causally related to the accepted September 30, 2019 employment incident.<sup>18</sup>

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<sup>16</sup> *J.V.*, Docket No. 21-0029 (issued April 15, 2022); *D.F.*, 21-0825 (issued February 17, 2022); *M.A.*, Docket No. 19-0616 (issued April 10, 2020); *C.M.*, Docket No. 19-0009 (issued May 24, 2019).

<sup>17</sup> *See supra* note 14.

<sup>18</sup> *See supra* note 20; *K.P.* Docket No. 21-0828 (issued December 22, 2021).



**ORDER**

**IT IS HEREBY ORDERED THAT** the January 5, 2022 decision of the Office of Workers' Compensation Programs is reversed in part and set aside in part; the case is remanded for further proceedings consistent with this decision of the Board.

Issued: October 20, 2022  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge  
Employees' Compensation Appeals Board