

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

S.H., Appellant	)	
	)	
and	)	Docket No. 22-1090
	)	Issued: January 19, 2023
U.S. POSTAL SERVICE, POST OFFICE,	)	
Nashville, TN, Employer	)	
	)	

*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:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On July 20, 2022 appellant, through counsel, filed a timely appeal from a June 24, 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 an injury in the performance of duty on July 22, 2020, as alleged.

## FACTUAL HISTORY

On July 31, 2020 appellant, then a 49-year-old city carrier, filed a traumatic injury claim alleging that on July 22, 2020 she strained the sole of her right foot/heel when she pulled something while stepping into her truck while in the performance of duty. In an attached handwritten statement dated July 31, 2020, she noted that on July 22, 2020 she felt a pull on the back of her heel and foot while stepping back into her truck. Appellant stated that it initially felt uncomfortable, and then worsened by the day. She indicated that she could not remember the address where the incident occurred. On the reverse side of the claim form, appellant's supervisor acknowledged that she was injured while in the performance of duty.

In an August 12, 2020 report, Dr. Benjamin Gear, a Board-certified orthopedic surgeon, indicated that appellant presented with right foot and ankle pain which developed after she had a right foot misstep and twisting injury while stepping into her truck on July 22, 2020. He noted that appellant had a history of pes planovalgus deformity. Examination findings and medical history were detailed. Dr. Gear diagnosed exacerbation of right foot and ankle severe subtalar joint and talonavicular joint chronic subluxation due to severe flatfoot and morbid obesity.

Dr. Gear, in reports dated September 15, October 21, and November 25, 2020, reiterated diagnoses, history, and findings from his August 12, 2020 report.

In reports dated January 5, March 5, and April 5, 2021, Dr. Gear reported a history of severe pes planovalgus, which had been exacerbated when she twisted it at work. In his January 5, 2021 report, explained that appellant twisted her ankle while getting out of a work truck. In reports dated March 5 and April 5, 2021, he described the incident as occurring when appellant twisted her ankle while cleaning out a work truck. Dr. Gear opined that he believed her condition to be chronic.

Dr. Gear, in a July 20, 2021 report, noted that appellant injured her ankle when she somehow twisted her ankle when she stepped out of her work truck. Physical examination findings were noted including very rigid per planovalgus and some residual forefoot supination from chronic forefoot. Dr. Gear diagnosed severe stage III posterior tibial tendon insufficiency aggravated by work injury.

In a development letter dated October 27, 2021, OWCP informed appellant of the type of factual and medical evidence necessary to establish her claim and provided a questionnaire for her completion. OWCP afforded appellant 30 days to provide the necessary evidence.

In a statement dated November 30, 2021, appellant noted that her injury occurred on July 20, 2020 on Route 5 at the Whitehaven Post Office. She related that she slipped while climbing back into her truck after a delivery which caused her to slip down the step and onto the pavement. Next, appellant stated that she initially assumed she had sprained her ankle, she did not

work the following day, called in sick on Friday, did not work on Saturday, and worked on Monday. She took Tuesday off because her foot was worsening and that when she returned to work on Wednesday July 20, 2020 she reported the accident. At the time appellant reported her injury to management, she did not know the address the incident occurred as the route was still unfamiliar to her.

By decision dated December 8, 2021, OWCP denied appellant's traumatic injury claim, finding that the factual evidence of record was insufficient to establish that the claimed incident occurred as alleged. It noted that she provided inconsistent statements as to when the incident occurred. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On December 21, 2021 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on April 11, 2022. Appellant testified that on Wednesday, July 20, 2020 she was getting ready to climb back into her truck when her foot slipped and slid down the asphalt, which was about five inches. As she was still familiarizing herself with her new route, she was not sure what the address was because many of the houses did not have house numbers or numbers on the mailboxes. She testified that she had the following Thursday off and that the following week when she came in, she informed management that she had hurt herself. Appellant denied any prior right foot injury in her testimony and alleged that her manager was going to make sure that it would be considered an old injury. Counsel asserted that appellant consistently stated the incident occurred on July 20, 2020 to her doctors and everyone else, but that the employing establishment wrote July 22, 2020 as the incident date on the form because that is the date she informed them of the incident.

By decision dated June 24, 2022, OWCP's hearing representative affirmed the December 8, 2021 decision.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>3</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>4</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>5</sup> These are the essential elements of each and every

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<sup>3</sup> *Id.*

<sup>4</sup> *L.T.*, Docket No. 20-0345 (issued June 21, 2022); *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>5</sup> *L.T., id.*; *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>6</sup>

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>7</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 experienced the employment incident at the time and place, and in the manner alleged.<sup>8</sup> Second, the employee must submit sufficient evidence to establish that the employment incident caused a personal injury.<sup>9</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>10</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.<sup>11</sup> 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>12</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>13</sup>

### ANALYSIS

The Board finds that appellant has not met her burden of proof to establish a traumatic injury in the performance of duty on July 22, 2020, as alleged.

In her Form CA-1 dated July 31, 2020, she indicated that on July 22, 2020 she pulled something stepping into her truck injuring her right foot/heel. Appellant repeated this allegation in her handwritten statement dated July 31, 2020. However, in a statement dated November 30,

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<sup>6</sup> *L.T., id.; 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).

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

<sup>8</sup> *L.T., id.; L.T.*, Docket No. 18-1603 (issued February 21, 2019); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>9</sup> *L.T., id.; B.M.*, Docket No. 17-0796 (issued July 5, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

<sup>10</sup> *L.Y.*, Docket No. 21-0221 (issued June 30, 2021); *M.W.*, Docket No. 20-1489 (issued March 29, 2021); *M.F.*, Docket No. 18-1162 (issued April 9, 2019); *Charles B. Ward*, 38 ECAB 667, 67-71 (1987).

<sup>11</sup> *See L.Y., id.; M.W., id.; V.J.*, Docket No. 19-1600 (issued March 13, 2020); *E.C.*, Docket No. 19-0943 (issued September 23, 2019).

<sup>12</sup> *L.T., supra* note 5; *Betty J. Smith*, 54 ECAB 174 (2002); *L.D.*, Docket No. 16-0199 (issued March 8, 2016).

<sup>13</sup> *See L.T., id.; M.C.*, Docket No. 18-1278 (issued March 7, 2019); *D.B.*, 58 ECAB 464, 466-67 (2007).

2021, she indicated that the injury occurred prior to Wednesday, July 20, 2020, and in her April 11, 2022 hearing testimony she indicated that her injury occurred on July 20, 2020, when her foot slipped as she was climbing back into her truck and slid down the step and onto the pavement/asphalt. Appellant also related that she consistently noted the injury date as July 20, 2020 to her physicians. However, Dr. Gear, in his reports, noted the date of injury as July 22, 2020.

The record also contains conflicting explanations as to how the injury occurred. Appellant claimed she injured her right foot or heel when she pulled something while stepping into her truck. However, she also indicated in her November 30, 2021 statement that she thought she had twisted her ankle. Dr. Gear, in reports dated August 12, September 15, October 21, and November 25, 2020 described the injury as occurring when appellant had a right foot misstep and sustained a twisting injury when stepping into her truck. In his January 5, 2021 report, he noted she twisted her ankle while getting out of a work truck while in his March 5 and April 2, 2021 reports he indicated that she twisted her ankle while cleaning out her work truck.

Appellant's varying descriptions of what occurred and how do not establish a singular account of the alleged incident.<sup>14</sup> As she has not provided a consistent description of the alleged employment incident the Board finds that she has not met her burden of proof.<sup>15</sup>

As appellant has not met her burden of proof to establish that the July 22, 2020 incident occurred in the performance of duty as alleged, it is unnecessary to address the medical evidence of record regarding causal relationship.<sup>16</sup>

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 a traumatic injury in the performance of duty on July 22, 2020, as alleged.

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<sup>14</sup> See *L.T.*, *supra* note 5; *E.C.*, *id.*; *D.B.*, 58 ECAB 464 (2007).

<sup>15</sup> *L.T.*, *id.*; *L.Y.*, *supra* note 11; *M.W.*, *supra* note 11; *H.D.*, Docket No. 15-1698 (issued May 4, 2016).

<sup>16</sup> *L.T.*, *id.*; *L.Y.*, *id.* 11; *M.W.*, *id.*; *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 (2015).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 24, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 19, 2023  
Washington, DC

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

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

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