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

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| **M.S., Appellant** | ) | |
| **and** | ) | **Docket No. 23-0731** |
| | ) | **Issued: January 5, 2024** |
| **U.S. POSTAL SERVICE, BEDFORD PARK POST OFFICE, Bedford Park, IL, Employer** | ) | |

*Appearances:*
*Stephanie Leet, Esq.,* for the appellant[1]
*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 April 27, 2023 appellant, through counsel, filed a timely appeal from an April 3, 2023 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]

[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 April 3, 2023 decision, appellant submitted additional evidence to OWCP. 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 her burden of proof to establish an injury in the performance of duty on November 6, 2021, as alleged.

## ***FACTUAL HISTORY***

On November 9, 2021 appellant, then a 56-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on November 6, 2021 she broke her ankle when she fell down steps while in the performance of duty. On the reverse side of the claim form, an employing establishment supervisor, S.P., acknowledged that appellant was injured in the performance of duty, and indicated that her knowledge of the facts about the injury agreed with the statements of appellant and/or witnesses. Appellant stopped work on the date of the alleged injury.

In support of her claim, appellant submitted a November 6, 2021 statement from S.P., who related that appellant telephoned her at 3:05 p.m. on that date and advised that she had "rolled her right ankle as she was going down the steps on the dock to leave for the day" and had fallen on her right leg. She asked S.P. to come to the parking lot. S.P. arrived at appellant's truck and offered to call an ambulance or her husband, which appellant declined. When S.P. indicated that an accident report should be completed, appellant refused at that time and drove home. At 4:02 p.m., she called S.P. and related that she was on her way to the emergency room.

In a November 6, 2021 provider note, Dr. Antony Wollaston, a Board-certified emergency physician, treated appellant for right ankle pain, diagnosed an ankle fracture, and noted that she reported that she rolled her ankle two times in the last two days while walking. An x-ray report of even date of the right ankle indicated a mildly displaced trimalleolar fracture at the ankle.

In a November 7, 2021 progress note, Dr. David Levinsohn, a Board-certified orthopedic surgeon, performed a physical examination and diagnosed an ankle fracture with a small posterior malleolus fragment and mildly displaced medial malleolus fracture anteriorly. He performed an open reduction and internal fixation (ORIF) of the right fibula, medial malleolus, and repair of syndesmosis.

In November 7 and 8, 2021 progress notes, Dr. Isidoros Vardaros, a Board-certified family physician, treated appellant and diagnosed a mildly displaced bimalleolar fracture. On November 7, 2021 she noted that appellant had presented at the emergency department after she twisted her ankle.

In a November 10, 2021 e-mail, appellant noted that on November 6, 2021 at approximately 3:45 p.m. she was leaving work and stepped off the back steps that led from the dock to the ground when her ankle gave way and she fell onto the pavement. She called out for help, but no one heard, so she used the steps and building to hop to her truck using her good leg, where she called her supervisor for help. S.P. arrived at the truck and offered to call 911, but appellant believed that she had simply sprained her ankle and chose to go home. When the pain did not improve, appellant sought medical treatment.

In a November 22, 2021 note, Dr. Levinsohn diagnosed a trimalleolar fracture of the right ankle and noted that appellant's right ankle incisions were healing well.

In a December 6, 2021 development letter, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence needed to establish her claim and provided a factual questionnaire for her completion. OWCP afforded appellant 30 days to submit the necessary evidence.

By decision dated January 4, 2022, OWCP denied appellant's traumatic injury claim, finding that the evidence of record was insufficient to factually establish that the November 6, 2021 employment incident occurred as alleged. It noted that she had not responded to its developmental questionnaire. Consequently, OWCP found that appellant had not met the requirements to establish an injury as defined by FECA.

In a January 18, 2022 response to the development questionnaire, appellant noted that she was leaving work and heading down the stairs of the loading dock when her ankle buckled and she fell. She related that no witnesses were present when her ankle was injured and she thought it was only a sprain, so she hopped to her truck and called her supervisor. Appellant explained that she may have fallen on the steps because she also rolled her ankle earlier on her route. She also indicated that she fell from the steps onto the parking lot, where she was required to park for loading and unloading.

A January 24, 2022 x-ray report of appellant's right ankle noted an impression of an ORIF of bimalleolar fractures with plate and fully cannulated screws securing a medial malleolar fracture, plate and screws securing a lateral malleolar fracture and distal fibula fracture, and hardware from syndesmotic fracture reduction.

A March 8, 2022 x-ray report of appellant's right ankle noted an impression of healing trimalleolar fracture status post ORIF and surrounding soft tissue edema. A June 9, 2022 x-ray report of the right ankle noted an impression of healed/healing trimalleolar status post ORIF, no hardware complication.

In a June 9, 2022 encounter note, Dr. Levinsohn indicated that appellant continued to experience intermittent soreness. He performed a physical examination and diagnosed seven months status post ORIF of the right trimalleolar ankle fracture.

On January 2, 2023 appellant, through counsel, requested reconsideration and submitted duplicate copies of previously submitted medical evidence. Counsel contended that appellant had submitted a statement of how she was injured at work on November 6, 2021 and asserted that S.P. had corroborated her account. She further asserted that the medical evidence was sufficient to establish that she injured her ankle on November 6, 2021.

By decision dated April 3, 2023, OWCP denied modification of its January 4, 2022 decision.

## ***LEGAL PRECEDENT***

An employee seeking benefits under FECA[4] 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

[4] *Supra* note 2.

limitation of FECA,[5] 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.[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 an injury and can be established only by medical evidence.[8]

To establish that an injury occurred as alleged, the injury need not be confirmed by eyewitnesses, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action. The employee has not met his or her burden when there are such inconsistencies in the evidence as to cast serious doubt on 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 serious doubt on the employee's statements in determining whether a *prima facie* case has been established.[9] 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.[10]

## ***ANALYSIS***

The Board finds that appellant has met her burden of proof to establish a traumatic incident in the performance of duty on November 6, 2021, as alleged.

In her November 9, 2021 Form CA-1, appellant alleged that on November 6, 2021 she broke her ankle when she fell down steps while in the performance of duty. On the reverse side of the claim form, an employing establishment supervisor, S.P., acknowledged that appellant was

[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).

[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] *S.E.*, Docket No. 22-0537 (issued March 7, 2023); *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[8] *L.M.*, Docket No. 22-0159 (issued February 15, 2023); *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] *T.F.*, Docket No. 23-0077 (issued April 13, 2023); *C.M.*, Docket No. 20-1519 (issued March 22, 2021); *Betty J. Smith*, 54 ECAB 174 (2002).

[10] *See F.S.*, Docket No. 21-1040 (issued March 10, 2023); *M.C.*, Docket No. 18-1278 (issued March 7, 2019); *D.B.*, 58 ECAB 464, 466-67 (2007).

injured in the performance of duty and that her knowledge of the facts about the injury agreed with the statements of appellant and/or witnesses.

Appellant reported the incident to her supervisor immediately. In a November 6, 2021 statement, S.P. related that appellant called her at 3:05 p.m. and requested that she come to appellant's truck in the parking lot of the employing establishment. Appellant informed S.P. that she had rolled her right ankle and fell on her right leg as she was descending the steps on the dock. S.P. offered to call 911. Appellant drove home, but at 4:02 p.m., she called to inform S.P. that she was heading to the emergency room.

Further, the medical evidence contemporaneous with the alleged November 6, 2021 employment incident establishes that appellant sought medical treatment on the date of injury, and underwent surgery for a broken ankle the next day. In a November 6, 2021 provider note, Dr. Wollaston diagnosed an ankle fracture, and noted that appellant reported that she rolled her ankle two times in the last two days while walking. On November 7, 2021 Dr. Levinsohn diagnosed an ankle fracture with a small posterior malleolus fragment and mildly displaced medial malleolus fracture anteriorly, and performed an ORIF of the right fibula, medial malleolus and repair of syndesmosis.

The injury appellant claimed is consistent with the facts and circumstances she set forth, statements from her supervisor, and her course of action. As noted, an employee's statement alleging that an injury occurred at a given time and place, and in a given manner, is of great probative value and will stand unless refuted by strong or persuasive evidence.[11] There are no inconsistencies in the evidence that cast serious doubt upon the validity of the claim, and thus the Board finds that appellant has established a traumatic incident in the performance of duty on November 6, 2021, as alleged.

As appellant has established that an incident occurred in the performance of duty on November 6, 2021 as alleged, the question becomes whether the incident caused an injury.[12] As OWCP found that she 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.[13] After this and other 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 November 6, 2021 employment incident.

## ***CONCLUSION***

The Board finds that appellant has met her burden of proof to establish a traumatic incident in the performance of duty on November 6, 2021, as alleged.

[11] *D.F.*, Docket No. 21-0825 (issued February 17, 2022); *see also M.C.*, *id.*; *D.B.*, *id*.

[12] *L.G.*, Docket No. 21-0343 (issued May 9, 2023); *M.A.*, Docket No. 19-0616 (issued April 10, 2020); *C.M.*, Docket No. 19-0009 (issued May 24, 2019).

[13] *D.F.*, *supra* note 11; *L.D.*, Docket No. 16-0199 (issued March 8, 2016); *Betty J. Smith*, *supra* note 9.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the April 3, 2023 decision of the Office of Workers' Compensation Programs is reversed and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: January 5, 2024
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