United States Department of Labor
Employees' Compensation Appeals Board

T.J., Appellant	)	
and	)	**Docket No. 07-1858**
	)	**Issued: November 27, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Nekoosa, WI, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 26, 2007 appellant filed a timely appeal from an Office of Workers' Compensation Programs' merit decision dated June 20, 2007. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that she sustained an injury to her lower back on March 9, 2007 in the performance of duty.

FACTUAL HISTORY

Appellant, a 47-year-old rural route mail carrier, filed a Form CA-1 claim for benefits on March 21, 2007, alleging that she fell and fractured bones in her lower back on March 9, 2007 while in the performance of duty. The record establishes that appellant was required to drive her

truck to and from work and for mail delivery. In a statement attached to the form, appellant asserted:

> "On the morning of March 9, 2007, I took my dogs outside and started my truck for work as I do every other day. I put the dogs back in the house and went out to get in my truck for work. I opened the door to my truck and instead of watching where I was going I was looking at my dogs in our dining room window, slipped on some ice and fell on my left knee, then landed on my butt. I got up and proceeded on my way to work. My back pain got continuously worse at work. [My supervisor] was able to find a relief for my route and I was able to see a doctor at 10.00 a.m."

On the form, appellant's husband submitted a witness statement, dated March 20, 2007, in which he asserted:

> "I watched my wife fall as she was leaving for work. She was getting in the truck to go to work when she slipped and fell. Her truck was running and warmed up ready to go. I opened the front door and asked her if she was all right. She looked at me and said that [she was hurting]. Then she headed off to work."

The record contains a March 9, 2007 statement from Vickie Scholze-Parker, appellant's coworker, who stated:

> "[I] do n[o]t know the exact words [appellant] used, but [she said she] had let [the] dogs out and slipped on ice."

Appellant submitted a March 13, 2007 report from Riverview Hospital, which diagnosed an L4 bilateral facet fracture at the anterior and posterior approach.

Appellant's coworker, J. Greening, submitted a March 28, 2007 statement in which he asserted, "I asked [appellant] what was wrong. She said that she had fallen when she took the dogs out. It was icy." Gerald Hooper, another of appellant's coworkers, submitted a March 28, 2007 statement in which indicated, "I overheard [appellant] saying that she slipped and fell on ice when letting dogs out in [the] morning."

Appellant's supervisor, Postmaster Gary Gukenberger, also submitted a March 28, 2007 statement. He stated:

> "When I arrived at the [employing establishment] on Friday, March 9, 2007, [appellant] informed me she slipped on ice at home when she took her dogs out in the morning. She stated [that] her back hurt and would need a substitute to work so [that] she could go to [the] doctor. [Appellant] worked from 7:00 a.m. to about 9:00 a.m. when a substitute came in. She called back later that afternoon [and stated that] the doctor needed her in immediately for surgery, that her back was broke. In talking with [appellant] on Monday, she then said she fell when she was getting into her truck to come to work. Tuesday, when she called about the Form CA-1 that was sent to her she was not sure if she should fill it out, if the claim would be turned down because she was not in the truck."

By letter dated April 2, 2007, the Office advised appellant that it required factual and medical evidence to determine whether she was eligible for compensation benefits. The Office asked appellant to submit a report from her treating physician containing a diagnosis of her condition and an opinion as to whether her claimed condition was causally related to her federal employment. The Office requested that appellant submit this evidence within 30 days.

In a March 9, 2007 report from Riverview Hospital, Dr. Richard E. Simpson, a specialist in diagnostic radiology, interpreted the results of the March 9, 2007 magnetic resonance imaging (MRI) scan. He diagnosed severe disc space narrowing with endplate degenerative changes at L4-5, which appeared to be caused by facet fracture of the inferior facets at L4.

In a March 28, 2007 report, Dr. James A. Wilkes, Board-certified in orthopedic surgery, indicated that appellant was completely incapacitated.

In an April 5, 2007 statement, appellant asserted:

> "On March 9, 2007 I was halfway into my truck to go to work at the [employing establishment]. My right foot was already in my truck when my left foot slipped out on ice and I fell back out of my truck. I landed on my left knee then fell on my butt. I got up, got back into my truck and went to work. I would not have been outside getting into my truck if I wouldn't have been going to work."

By decision dated May 10, 2007, the Office denied the claim. It accepted that the March 9, 2007 incident had occurred, but found that appellant failed to submit sufficient medical evidence to establish that the claimed medical condition resulted from the accepted event.

On May 24, 2007 appellant requested reconsideration.

Appellant submitted an April 13, 2007 report from Dr. Douglas P. Galuk, Board-certified in orthopedic surgery, who performed lower back surgery on appellant on March 10, 2007. Dr. Galuk stated:

> "[Appellant] is a 47-year-old white female who had an acute L4-5 spondylolisthesis. She was taken to the operating room on the morning of March 10, [2007] and underwent an anterior inner body distraction, discectomy and fusion, followed by posterior instrumentation from L4-5. [Appellant] tolerated the procedure well, and was discharged to the recovery room and back to the floor in stable condition."

Dr. Galuk advised that appellant progressed well through physical therapy and was in sufficiently good condition to be discharged from the hospital on March 13, 2007.

In a report dated May 17, 2007, Dr. Wilkes reiterated that appellant was completely incapacitated.

By decision dated June 20, 2007, the Office denied appellant's claim but modified its May 10, 2007 decision by finding that appellant's injuries were not sustained while she was in the performance of duty and that the evidence was insufficient to establish that her injury occurred in the manner she had alleged.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[1] has the burden of establishing that 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 the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged, and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[2] 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.[3]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a "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.[4] 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.[5]

The Office cannot accept fact of injury if there are such inconsistencies in the evidence as to seriously question whether the specific event or incident occurred at the time, place and in the manner alleged, or whether the alleged injury was in the performance of duty,[6] nor can the Office find fact of injury if the evidence fails to establish that the employee sustained an "injury" within the meaning of the Act. 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, as alleged, but the employee's statements must be consistent with surrounding facts and circumstances and her subsequent course of action.[7] 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 case doubt on an employee's statements in determining whether he or she has established his or her claim.[8]

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[1] 5 U.S.C. § 8101 *et seq*.

[2] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[3] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[4] *John J. Carlone*, 41 ECAB 354 (1989).

[5] *Id.* For a definition of the term "injury," *see* 20 C.F.R. § 10.5(e).

[6] *Elaine Pendleton*, *supra* note 2.

[7] *See Gene A. McCracken*, Docket No. 93-2227 (issued March 9, 1995); *Joseph H. Surgener*, 42 ECAB 541, 547 (1991).

[8] *See Constance G. Patterson*, 42 ECAB 206 (1989).

ANALYSIS

In this case, appellant has not established fact of injury because of inconsistencies in the evidence that cast serious doubt as to whether the specific event or incident occurred at the time, place and in the manner alleged. She alleged in her March 21, 2007 statement that she fell and injured her lower back on the morning of March 9, 2007 while getting into her truck, on her way to work. Appellant stated that her injury occurred when she opened the door to her truck, slipped on some ice and fell on her lower back. Her husband submitted a witness statement which corroborated appellant's account of how her injury occurred. These statements, however, were contradicted by the statements submitted by appellant's supervisor and two of her coworkers. These employees asserted that appellant told them that her injury occurred when she slipped on some ice while she was out walking her dogs, before she set out for work. Appellant's supervisor, Gary Gukenberger, stated that appellant initially told him on Friday, March 9, 2007 that her injury occurred while she was walking her dogs; however, he indicated that she changed her story on Monday, March 12, 2007, when she said she fell when she was getting into her truck to come to work. He related that, on Tuesday, March 13, 2007, appellant called and told him she was not sure if she should fill out the Form CA-1 because she feared her claim would be denied because she was not in her truck when she was injured.

Appellant can be reasonably imputed to have knowledge of when she sustained an injury that caused her to be medically released from work.[9] However, the record contains conflicting accounts of how appellant actually sustained her injury on March 9, 2007. In addition, she did not submit any medical evidence which attributed her lower back fractures to the March 9, 2007 incident. This contradictory evidence created an uncertainty as to the time, place and the manner in which appellant sustained her alleged lower back injury.

Therefore, given the inconsistencies in the evidence regarding how appellant sustained her injury, the Board finds that there is insufficient evidence to establish that appellant sustained an injury in the performance of duty as alleged.[10] Accordingly, the Board affirms the June 20, 2007 Office decision.[11]

[9] The evidence submitted by an employing establishment on the basis of their records will prevail over the assertions from the claimant unless such assertions are supported by documentary evidence. *See generally Sue A. Sedgwick*, 45 ECAB 211, 218 n.4 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computation of Compensation*, Chapter 2.900(b)(3) (September 1990).

[10] *See Mary Joan Coppolino*, 43 ECAB 988 (1992) (where the Board found that discrepancies and inconsistencies in appellant's statements describing the injury created serious doubts that the injury was sustained in the performance of duty).

[11] As the Board has affirmed the Office's June 20, 2007 decision on the basis of its finding that appellant's injury did not occur in the manner alleged, it need not consider the Office's additional finding that her March 9, 2007 injury did not occur while she was in the performance of duty.

CONCLUSION

The Board finds that the Office properly found that appellant failed to meet her burden of proof to establish that she sustained a lower back injury in the performance of duty on March 9, 2007.

ORDER

IT IS HEREBY ORDERED THAT the June 20, 2007 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: November 27, 2007
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board