

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

D.M., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
CUSTOMS & BORDER PROTECTION,
El Paso, TX, Employer**

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**Docket No. 14-1473
Issued: October 14, 2014**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 16, 2014 appellant filed a timely appeal from a February 20, 2014 decision of the Office of Workers' Compensation Programs (OWCP) denying a traumatic injury claim. 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.

ISSUE

The issue is whether appellant has established that she sustained a traumatic injury in the performance of duty as alleged.

¹ 5 U.S.C. § 8101 *et seq.*

On appeal, appellant asserts that the medical evidence is sufficient to establish that the claimed injury is work related.²

FACTUAL HISTORY

On July 3, 2013 appellant, then a 42-year-old border patrol agent, filed a traumatic injury claim (Form CA-1) indicating that on June 8, 2013, she sustained a pinched nerve on the right side of her neck when operating a “kilo vehicle.” She alleged that her physicians instructed her not to drive a “kilo” due to a prior occupational injury to the lumbar spine. On the reverse of the form, appellant’s supervisor noted that appellant had stated that she could not drive certain vehicles due to a prior back injury.

In a July 11, 2013 letter, OWCP advised appellant of the type of evidence needed to establish her claim, including factual evidence supporting timely filing and performance of duty and medical evidence explaining how and why the June 8, 2013 incident would cause the claimed neck injury. Appellant was afforded 30 days to submit such evidence.

In support of her claim, appellant submitted an August 6, 2013 statement noting a history of right knee and hip surgery and an occupational lumbar injury. She explained that, on June 8, 2013, she used her arms to pull herself out of a kilo vehicle in an attempt not to aggravate prior lumbar and right leg injuries. Appellant contended that her physicians instructed her not to drive a kilo as it did not have an adjustable seat. She asserted that, although she advised the employing establishment of this restriction more than a year previously, she was still assigned to drive kilo vehicles.

Appellant provided July 12, 2013 reports from Dr. Eric Sides, an attending Board-certified orthopedic surgeon, relating her account of the June 8, 2013 incident and onset of right-sided neck pain radiating into the right upper extremity. Dr. Sides diagnosed cervicgia and brachial neuritis/radiculitis.³ He stated that appellant could perform full-duty work but without “use of jeeps/kilo vehicles.”

Appellant also submitted reports dated from July 12 to August 31, 2013 reports from Dr. David Sime, an attending chiropractor, who diagnosed spinal subluxation by x-ray.⁴ Dr. Sime related her account of the onset of right-sided neck and arm pain after pulling herself up by the arms in a kilo vehicle.

² Appellant submitted new medical evidence accompanying her request for appeal. The Board may not consider new evidence for the first time on appeal that was not before OWCP at the time it issued the final decision in the case. 20 C.F.R. § 501.2(c).

³ A July 18, 2013 magnetic resonance imaging (MRI) scan showed degenerative disc disease throughout the cervical spine and mild disc bulges at C3-4 and C5-6, with minor deformity of the thecal sac at the level of C3-4.

⁴ Dr. Sime obtained July 12, 2013 x-rays showing moderate general cervical spondylosis from C4 to C7. He opined that these x-rays also showed rotation subluxations of all cervical segments. Section 8101(2) of FECA provides that the term “physician” includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist. 5 U.S.C. § 8101(2). OWCP indicated that, as Dr. Sime diagnosed spinal subluxation by x-ray, he qualified as a physician under FECA for the purposes of this case.

By decision dated August 22, 2013, OWCP denied appellant's claim on the grounds that causal relationship was not established. It found that the June 8, 2013 incident occurred at the time, place and in the manner alleged. OWCP further found, however, that appellant's physicians did not explain the medical reasons why pulling herself up in a kilo vehicle would cause the claimed cervical spine injury.

In a September 6, 2013 letter, appellant requested a review of the written record. She provided reports from Dr. Sime dated from July 8 to August 28, 2013, discussing a prior lumbar injury and noting that her neck condition was improving with massage therapy. Appellant also submitted a January 6, 2012 lumbar imaging study and July 27, 2012 report from Dr. Sides stating that, due to a January 17, 2011 lumbar injury, she should not be assigned kilo or Jeep vehicles as they did not have an adjustable seat. Dr. Sides reiterated the restriction against driving kilo or jeep vehicles on a July 13, 2013 form report. He diagnosed cervical disc displacement without myelopathy. Dr. Sides checked a box "yes" indicating that the diagnosed cervical condition was a work-related injury. The checked box was the sole evidence provided.

By decision dated and finalized February 20, 2014, an OWCP hearing representative affirmed OWCP's August 22, 2013 decision, finding that the medical evidence did not contain a sufficient explanation supporting causal relationship. The hearing representative noted that checking a box "yes" on a form report was insufficient to establish that the June 8, 2013 incident caused the claimed neck injury.

LEGAL PRECEDENT

An employee seeking benefits under FECA has the burden of establishing 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 filed within the applicable time limitation; that an injury was sustained while 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.⁵ These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.⁶

In order to determine whether an employee sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether "fact of injury" has been established. Generally, fact of injury consists of two components that must be considered conjunctively. First, the employee must submit sufficient evidence to establish that he or she actually experienced the alleged employment incident.⁷ 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.⁸

⁵ *Joe D. Cameron*, 41 ECAB 153 (1989).

⁶ *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999).

⁷ *Gary J. Watling*, 52 ECAB 278 (2001).

⁸ *Deborah L. Beatty*, 54 ECAB 340 (2003).

ANALYSIS

Appellant asserts that she sustained a cervical spine injury on June 8, 2013 when she pulled herself up by the arms in a kilo vehicle. OWCP accepted that the June 8, 2013 incident occurred as alleged and was in the performance of duty. However, it denied the claim by August 22, 2013 and February 20, 2014 decisions, finding that appellant's physicians did not provide sufficient reasoning to support a causal relationship between the accepted incident and claimed neck injury.

Dr. Sides, an attending Board-certified orthopedic surgeon, provided reports from January 6, 2012 to July 13, 2013 noting a January 2011 lumbar injury and appellant's account of the June 8, 2013 incident. He diagnosed cervicgia and brachial radiculitis. In July 27, 2012 and July 13, 2013 reports, Dr. Sides prohibited appellant from driving a jeep or kilo vehicle, but did not explain how or why her use of the vehicle or pulling herself up by her arms to exit the kilo, would cause the claimed neck injury. This lack of medical rationale significantly diminishes the probative value of his opinion.⁹ In a July 13, 2013 form, Dr. Sides checked a box "yes" indicating that the diagnosed cervical condition was work related. However, as noted the Board has held that merely checking a box "yes" on a form report is not sufficient to establish causal relationship.¹⁰

Appellant also submitted reports dated from July 12 to August 31, 2013 from Dr. Sime, an attending chiropractor, who related her account of the accepted incident, but did not explain how and why it would result in the claimed cervical spine injury or the diagnosed spinal subluxations. Dr. Sime's opinion is therefore insufficient to meet appellant's burden of proof.

The Board notes that OWCP advised appellant by July 11, 2013 letter of the need to submit her physician's opinion explaining how and why the June 8, 2013 incident would cause the claimed injury. However, appellant did not submit such evidence. Therefore, she failed to meet her burden of proof in establishing causal relationship.

On appeal, appellant asserts that the medical evidence is sufficient to establish that the June 8, 2013 incident caused the claimed cervical spine injury. As stated above, her physicians did not explain how and why pulling herself up with her arms in a kilo vehicle would cause the claimed cervical spine injury. 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 established that she sustained a traumatic injury in the performance of duty as alleged.

⁹ *Id.*

¹⁰ *Donald W. Long*, 41 ECAB 142 (1989).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 20, 2014 is affirmed.

Issued: October 14, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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