

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

A.R., Appellant

and

**DEPARTMENT OF AGRICULTURE, FOREST
SERVICE, Winchester, KY, Employer**

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**Docket No. 13-1386
Issued: November 1, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 22, 2013 appellant filed a timely appeal from a December 6, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his 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 met his burden of proof to establish that he sustained a back injury on October 6, 2011 while in the performance of duty.

On appeal, appellant contends that he sustained a work-related back injury. He did not delay in filing his claim as he completed an incident report immediately after his injury. Management failed to assist him with filling out forms. Appellant denied telling his supervisor that he had back problems prior to October 6, 2011. A computerized tomography (CT) scan was performed following a February 2011 car accident and revealed no back injury. Appellant's prior employment in the coal mining industry is not related to his claimed injury.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 24, 2011 appellant, then a 53-year-old administratively determined contract employee (warehouse worker), filed a traumatic injury claim (Form CA-1) alleging that on October 6, 2011 he developed lower back pain as a result of unloading a table from a van at work. On the claim form, the employing establishment stated that it received notice of the claim on October 12, 2011. Matthew J. Dean, a manager, stated that appellant sustained a back injury in a motor vehicle accident and worked for coal mines prior to working at the employing establishment.

A Form CA-20 was signed on October 24, 2011 by Lee Ann Brewer, an advanced practice registered nurse, who obtained a history that on October 6, 2011 appellant was lifting and unloading tables out of a van at work. She diagnosed lumbago and sciatica and advised that these conditions were caused or aggravated by the employment activity. Nurse Brewer stated that appellant had no pain until October 6, 2011. In reports dated October 24 and November 14, 2011, she reiterated her diagnoses of lumbago and sciatica and history of injury. Nurse Brewer also diagnosed degeneration of the lumbar or lumbosacral intervertebral. In the October 24, 2011 report, appellant related to Nurse Brewer that he had experienced pain since the October 6, 2011 incident. He thought he had just pulled a muscle and missed work the following day. Appellant returned to work, but his pain continued to worsen and he went to a hospital emergency room for medical treatment.

In medical reports dated October 31 and December 14, 26 and 28, 2011, Dr. Ashu T. Joshi, an attending Board-certified internist, stated that appellant was being treated in follow up for back pain. Dr. Joshi listed findings on physical examination and diagnosed lumbago, sciatica, degeneration of the lumbar or lumbosacral intervertebral and thoracic or lumbosacral neuritis or radiculitis. In referral slips dated December 14 and 26, 2011, he reiterated his diagnoses of lumbago, sciatica and thoracic or lumbosacral neuritis or radiculitis and ordered evaluation and treatment of these conditions. Dr. Joshi also referred appellant for a magnetic resonance imaging (MRI) scan of the lumbar spine. On January 16, 2012 he continued to follow up appellant for back pain. Dr. Joshi noted that an MRI scan had been performed. He listed findings on physical examination and diagnosed muscle spasm.

By letter dated January 25, 2012, OWCP advised appellant that lumbago and sciatica were considered as pain under FECA and not valid diagnoses. His diagnosis of degeneration of the lumbosacral areas was considered a degenerative process due to aging and not the result of a one-time traumatic injury. It requested that appellant submit factual and medical evidence, including a rationalized medical opinion from an attending physician which described a history of injury which included prior back conditions and provided dates of examination and treatment, findings, test results, a diagnosis together with medical reasons on how the reported work incident caused his medical condition. OWCP also requested that the employing establishment submit any medical evidence regarding treatment appellant received at its medical facility and factual evidence regarding his two-week employment dates and job description.

In an October 21, 2011 report, Dr. Christine N. Riley, a Board-certified radiologist, advised that a CT scan of the lumbar spine revealed no acute abnormality, a mild disc bulge at L4-L5 that created borderline to mild stenosis of the neural foramina and mild degenerative facet joint changes at L4-S1.

In a January 12, 2012 report, Dr. Paul C. Wooldridge, a Board-certified radiologist advised that an MRI scan of the lumbar spine demonstrated anterior wedging and endplate irregularity of four consecutive lower thoracic and upper lumbar vertebral bodies that were concerning for Scheuermann's disease. Disc disease was found throughout the lumbar spine predominantly at L4 and L5 with disc protrusion most pronounced on the left at L4 and L5 which possibly accounted for appellant's symptoms.

On February 13, 2012 OWCP received a response to its January 25, 2012 letter presumably from an unidentified healthcare provider. Appellant was evaluated on October 24 and 31, November 14 and December 26, 2011. He had no prior back conditions. The date of injury was October 6, 2011. A CT scan was performed on October 21, 2011 and an MRI scan was performed on December 14, 2011. Appellant had thoracic or lumbosacral neuritis or radiculitis. There was a temporal association between his symptoms and his accident at work.

In a letter dated February 17, 2012, the employing establishment stated that, appellant was hired as an administratively determined contract employee (warehouse worker) for a two-week period. It submitted his timesheet for the period October 3 through 15, 2011 and pay rate information.

In a February 29, 2012 decision, OWCP accepted that the October 6, 2011 incident occurred as alleged. It denied appellant's claim, finding insufficient medical evidence to establish that he sustained a back injury causally related to the accepted employment incident.

On March 7, 2012 the employing establishment advised OWCP that it issued the Form CA-16. On March 8, 2012 it denied issuing a Form CA-16.

On March 15, 2012 OWCP reissued the February 29, 2012 decision to appellant's correct mailing address.

In an undated letter, appellant requested reconsideration. He contended that at the time of injury he was advised to go to St. Joseph-London Hospital for evaluation. Appellant did as instructed and continued to follow up with Dr. Joshi. He noted his diagnosis of a severe musculoligamentous strain in the lumbar region by Dr. William H. Brooks, a Board-certified neurologist. Appellant contended that his claim was hastily denied by OWCP prior to its receipt of Dr. Brooks' report.

In a February 23, 2012 report, Dr. Brooks stated that he obtained a narrative, performed a neurological examination and reviewed diagnostic studies at the request of Dr. Joshi. He opined that appellant had a severe musculoligamentous strain in the lumbar area. An unsigned partial report dated February 23, 2012 presumably from Dr. Brooks noted that Dr. Joshi had evaluated appellant for severe back pain with paresthesia and pain in both lower extremities. Dr. Brooks obtained a history of injury that on October 6, 2011 appellant was in good health until the onset of severe low back pain on October 6, 2011 while lifting a folded table from a van. He had some radiculopathy, however, it was nondermatomal and ill-defined. Dr. Brooks noted appellant's ongoing pain and stated that most of it was axial and nonradicular which was consistent with a musculoligamentous strain.

Medical records dated October 21, 2011 from St. Joseph-London Hospital Emergency Department stated that appellant was treated for sudden onset of lower back pain at work on October 6, 2011. He had a herniated disc and was excused from work through October 24, 2011.

In a February 21, 2012 report, Dr. Joshi noted appellant's continuing back pain that radiated to his hips. He also had numbness and tingling in his legs. Dr. Joshi listed findings on physical examination and reiterated his diagnosis of thoracic or lumbosacral neuritis or radiculitis and lumbago. Appellant also had pain in a lower limb.

By letter dated October 22, 2012, OWCP advised appellant that he did not claim a work injury or seek medical attention until after the expiration of his temporary appointment on October 15, 2011. He did not file a Form CA-1 until October 24, 2011, which was 18 days after the claimed event. Although appellant advised Dr. Joshi and Dr. Brooks that he had no history of back problems or back pain prior to October 6, 2011, the employing establishment reported that he was involved in a car accident resulting in a back injury and worked for the coal mines prior to his employment at the agency. OWCP requested that he submit a detailed written statement describing the October 6, 2011 incident and what he did prior to and after this incident, and whether he had any injuries or received any medical treatment prior to this incident. It also requested that appellant submit medical records pertaining to his medical history. He did not respond.

In a December 6, 2012 decision, OWCP denied modification of its prior decision. It found that appellant's delay in filing a claim and the partial or inaccurate history of injury that he provided to his physician casted serious doubt upon the validity of his claim.

LEGAL PRECEDENT

An employee seeking benefits under FECA² 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 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.³ 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.⁴

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. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at

² *Id.*

³ *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁴ *See Irene St. John*, 50 ECAB 521 (1999); *Michael E. Smith*, 50 ECAB 313 (1999); *Elaine Pendleton*, *supra* note 3.

the time, place and in the manner alleged. Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.⁵

An employee's statement 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.⁶ Moreover, an injury does not have to be confirmed by eyewitnesses. The employee's statement, however, must be consistent with the surrounding facts and circumstances and his subsequent course of action. An employee has not met his burden in establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim. Circumstances such 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 doubt on an employee's statement in determining whether a *prima facie* case has been established.⁷

ANALYSIS

The Board finds that appellant established that on October 6, 2011 he unloaded a table out of a van at work. As noted, an employee's statement alleging that an incident 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.⁸ Appellant's account of the October 6, 2011 incident was consistent throughout the case record. His narrative paralleled the medical histories obtained by Nurse Brewer, Dr. Brooks and the hospital emergency department.⁹ In addition, the February 13, 2012 response from an unidentified healthcare provider reported October 6, 2011 as the date of injury.

On appeal, appellant contended that he filed an incident report immediately following his injury on October 6, 2011. The record does not contain this evidence. However, while appellant did not immediately report his injury or seek medical treatment, this does not render the claim factually deficient. Initially, he thought he had just pulled a muscle and only missed work the day following his injury. After his return to work his pain worsened. On October 21, 2011 he was treated in the St. Joseph-London hospital emergency department. Mr. Dean contended that appellant sustained a back injury as a result of a motor vehicle accident and worked in the coal mine industry prior to his employment at the employing establishment. These contentions, however, are not substantiated by the case record. In view of the totality of the evidence, the Board finds that an employment incident occurred on October 6, 2011, as alleged. Thus, appellant has met the first component of fact of injury.

⁵ *T.H.*, 59 ECAB 388 (2008).

⁶ *R.T.*, Docket No. 08-408 (issued December 16, 2008); *Gregory J. Reser*, 57 ECAB 277 (2005).

⁷ *Betty J. Smith*, 54 ECAB 174 (2002).

⁸ See cases cited, *supra* note 6.

⁹ See *Caroline Thomas*, 51 ECAB 451 (2000) (a consistent history of the injury as reported on medical reports, to the claimant's supervisor and on the notice of injury can be evidence of the occurrence of the incident).

The remaining issue is whether the medical evidence establishes that appellant sustained an injury causally related to the established employment incident. In order to establish a causal relationship between the diagnosed condition and any resulting disability and the employment incident, he must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting such causal relationship.¹⁰

The reports and referral slips from Dr. Joshi found that appellant had lumbago and sciatica. The Board has consistently held that pain is a symptom, not a compensable medical diagnosis.¹¹ Dr. Joshi's diagnoses of degeneration of the lumbar or lumbosacral intervertebral and thoracic or lumbosacral neuritis or radiculitis are speculative in nature and insufficient to establish a firm diagnosis.¹² Moreover, he did not provide a history of injury¹³ or an opinion addressing whether the October 6, 2011 employment incident caused or aggravated the diagnosed lumbar conditions.¹⁴ The Board finds, therefore, that Dr. Joshi's reports and referral slips are of diminished probative value and do not establish appellant's claim.

Similarly, the February 23, 2012 reports from Dr. Brooks and the diagnostic test results from Drs. Riley and Wooldridge are insufficient to establish appellant's claim as none of the physicians provided an opinion addressing the causal relationship between the diagnosed lumbar conditions and the October 6, 2011 employment incident.¹⁵ Further, the October 21, 2011 medical records from St. Joseph-London Hospital Emergency Department found that appellant had a herniated disc and was disabled for work through October 24, 2011, but failed to provide an opinion on whether the diagnosed condition and resultant disability were caused or aggravated by the established employment incident.

The medical reports from Nurse Brewer have no probative medical value in establishing appellant's claim as a nurse is not a physician as defined under FECA.¹⁶

The response to OWCP's January 25, 2012 developmental letter from an unidentified healthcare provider lacks probative medical value as the author cannot be identified as a physician.¹⁷

¹⁰ *T.H.*, 59 ECAB 388 (2008); *James Mack*, 43 ECAB 321 (1991).

¹¹ *C.F.*, Docket No. 08-1102 (issued October 10, 2008); *Robert Broome*, 55 ECAB 339 (2004).

¹² *G.M.*, Docket No. 11-1152 (issued January 20, 2012); *M.P.*, Docket No. 09-1752 (issued June 7, 2010).

¹³ *Frank Luis Rembisz*, 52 ECAB 147 (2000) (medical opinions based on an incomplete history have little probative value).

¹⁴ *A.D.*, 58 ECAB 149 (2006) (medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

¹⁵ *Id.*

¹⁶ *See* 5 U.S.C. § 8101(2); *G.G.*, 58 ECAB 389 (2007).

¹⁷ *See Ricky S. Storms*, 52 ECAB 349 (2001); *Morris Scanlon*, 11 ECAB 384, 385 (1960).

The Board finds that appellant has failed to submit any rationalized probative medical evidence to establish that he sustained a back injury causally related to the October 6, 2011 employment incident. Appellant did not meet his burden of proof.

On appeal, appellant contended that he sustained a work-related back injury as he did not delay in filing his claim, tell his supervisor that he had back problems prior to October 6, 2011 or sustain a back injury following a February 2011 car accident based on CT scan results. He also contended that his prior employment in the coal mining industry was not related to his claimed injury. Appellant's contentions are moot as the Board has found that the October 6, 2011 incident occurred as alleged. However, as found above, the Board finds that appellant did not submit any rationalized probative medical evidence supporting a causal relationship between his diagnosed lumbar conditions and the established employment incident.

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 his burden of proof to establish that he sustained a back injury on October 6, 2011 while in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the December 6, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 1, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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