

to get a catheterized urine specimen from a female patient and was bent over [the] patient to get [the] specimen and felt a strain and pop in my lumbar region of my back and instant back pain.” Appellant stopped work on July 30, 2012. His supervisor, Eugina Lucero, challenged the claim as she did not receive notice of the injury until August 8, 2012. She further indicated that appellant’s account of injury differed from what he told her before seeking medical treatment at the employing establishment’s clinic.

By letter dated August 14, 2012, OWCP requested that appellant submit additional factual and medical information in support of his claim, including a description of the work incident and a comprehensive medical report addressing the relationship between any diagnosed condition and the identified employment factor.

In a form report dated July 30, 2012, received by OWCP on August 22, 2012, Dr. Jason Bothwell, who is Board-certified in emergency medicine and works for the employing establishment, indicated that appellant sustained an initial injury lifting a patient who had fallen in the parking lot on July 6, 2012 and a subsequent injury on July 18, 2012. The description of the injury on July 18, 2012 is not legible. Dr. Bothwell diagnosed low back pain and recommended further evaluation. He checked “yes” that the condition was caused or aggravated by employment, noting that appellant was moving a patient.

In a statement dated July 31, 2012, received by OWCP on August 22, 2012, Ms. Lucero related that on July 30, 2012 she asked appellant why he was limping and he replied that “his back had been hurting for quite a while and that he was trying to ‘tough it out.’” Appellant told her that he “helped a patient in the coffee shop area approximately three months ago and thought he injured his back.” When Ms. Lucero questioned why he had not reported it sooner, he stated that it was not bad initially, but had worsened a few weeks ago when he lifted a patient from a wheelchair to an examination table.

On August 1, 2012 Dr. Peter C. Taylor, Board-certified in family medicine, diagnosed a work-related lumbar sprain with underlying degenerative disc disease and spondylosis of the lumbar spine. He described the injury as occurring at work on July 6, 2012 when appellant assisted a patient who fell out of a wheelchair. Subsequently, appellant’s back pain increased. Dr. Taylor found that appellant was unable to work July 30 to August 5, 2012.

In a report dated August 7, 2012, Dr. Taylor noted that a magnetic resonance imaging (MRI) scan study showed “severe central canal stenosis and displacement of the cauda equine and left S1 nerve root compression by [an] L5-S1 herniated disc.”² He referred appellant to Dr. Barbara E. Lazio, a Board-certified neurosurgeon, for an urgent consultation.

On August 8, 2012 appellant informed Ms. Lucero that he needed to file two separate claims, one for the person who fell and the second one for when he was assisting with a

² An MRI scan study of the lumbar spine dated August 3, 2012 showed disc and facet degeneration and a prior L4 and L5 laminotomy on the right, broad-based disc protrusions at L4-5 with nerve root compression, effacement of the right L5 nerve root, stenosis and displacement of the left L5 nerve root and the nerve roots of the cauda equine, moderate right and left neural foraminal stenosis, and a disc extrusion at L5 displacing the left S1 nerve root and partially effacing the left subarticular recess with moderate facet arthropathy and bilateral neural foraminal stenosis.

catheterization on a patient who kicked him and aggravated the pain in his lower back. On August 9, 2012 appellant advised Ms. Lucero of his need for surgery, noted that he had significant spinal cord impingement and related, "...that is "why I have been walking with that funny gait for the last two weeks since I did that cath specimen...."

In a statement dated August 8, 2012, Kathleen Walker, an LPN, related that appellant helped her obtain a urine sample using a catheter on a developmentally disabled patient. The patient was "hysterical, screaming and flailing about...." Appellant had to stop getting the specimen until she got one of the patient's legs out of her pants. He tried again and obtained the specimen.

On August 8, 2012 Dr. Lazio evaluated appellant's low back and leg pain bilaterally and indicated that it was a workers' compensation injury. She stated,

"[Appellant] first noted symptoms on July 6, 2012 when he assisted a patient who had fallen face first with a facial laceration and became unresponsive. He felt a twinge in his low back when he turned the patient over. [Appellant] continued to work as an LPN in the family practice clinic. On July 18, 2012 he had to catheterize a patient who was blind and somewhat combative [and] the pain increased significantly."

Appellant's pain worsened until July 28, 2012, at which time he sought treatment in the emergency room. Dr. Lazio noted that he had a history of an L4-5 lumbar discectomy due to a 2000 employment injury and an L5-S1 discectomy after a motor vehicle accident in 2004. She diagnosed a "[l]arge recurrent L4-5 disc extrusion with radiculopathy more likely than not as a result of his work-related injuries" on July 6 and 18, 2012. In a disability certificate dated August 8, 2012, Dr. Lazio found that appellant should stay off work pending surgery on his lumbar spine.

On August 9, 2012 Dr. Taylor indicated that appellant "injured his back during the course of his employment as a nurse."³ He diagnosed lumbar degenerative disc disease, lumbago, and sciatica with urinary incontinence.

In a form report dated August 9, 2012, Dr. Lazio opined that on July 6, 2012 appellant experienced low back pain after helping a patient who had fallen and on July 18, 2012 experienced a worsening of the pain with extension into his legs "catheterizing [a] combative patient." She diagnosed a lumbar herniated disc with radiculopathy and checked "yes" that the condition was caused or aggravated by employment.

In a statement dated August 9, 2012, Ms. Lucero related that appellant's description of the injury for which he sought treatment at the employing establishment's clinic differed from what he listed on his claim form. She also noted that he had outside employment, which also caused her "to question the validity of his claim." Ms. Lucero advised that appellant did not complain of pain or evidence a limp or movement problems before July 30, 2012.

³ On August 8, 2012 Dr. Taylor advised that appellant was unable to work.

In a form report dated August 10, 2012, Dr. Taylor diagnosed a disc extrusion, sciatica, lumbago, degenerative disc disease, and spinal canal stenosis. He provided a history of appellant experiencing back pain lifting a patient on July 6, 2012. Dr. Taylor checked “yes” that the condition was work related and found that he was totally disabled beginning August 6, 2012.

In a form report dated September 11, 2012, Dr. Lazio provided a history of appellant injuring his back obtaining a catheter specimen.⁴ She diagnosed a lumbar herniated disc secondary to injury and checked “yes” that the condition was caused or aggravated by employment.

By decision dated October 2, 2012, OWCP denied appellant’s claim after finding that he did not factually establish the occurrence of the alleged July 18, 2012 work incident.

In a form report dated September 4, 2012, received by OWCP on December 31, 2012, Dr. Lazio diagnosed lumbar spondylosis and a lumbar herniated nucleus pulposus. She listed a history of injury as appellant getting “kicked by a patient while trying to get a foley-catheter specimen.” Dr. Lazio checked “yes” that the condition was caused or aggravated by employment, and provided “see above” as a rationale.

On October 17, 2012 appellant requested reconsideration. He submitted August 28 and October 30, 2012 reports from Gregory B. Raappana, a physician assistant.

On January 16, 2013 appellant again requested reconsideration. He indicated that he sought treatment at the employing establishment’s emergency room but was referred to his primary care physician for an MRI scan study because the emergency room’s equipment was not working. In a statement dated January 17, 2013, appellant described his injury on July 18, 2012. He stated, “I was getting a catheter specimen of urine from a very ill and combative patient who was noncompliant and thrashing and kicking the entire procedure and I was kicked numerous times.” Appellant asserted that an MRI scan study performed in October 2004 did not show an injury at L4-5 but that his August 3, 2012 MRI scan study showed an L4-5 condition requiring surgery.⁵

By decision dated March 8, 2013, OWCP denied modification of its October 2, 2012 decision. It determined that there were inconsistencies regarding whether the July 18, 2012 work injury occurred as alleged. OWCP noted that the August 1, 2012 medical report, the first of record, did not mention a July 18, 2012 injury but instead discussed an injury on July 6, 2012.

Appellant submitted reports from Mr. Raappana dated March 28, 2012, July 2 and 23, 2013, and January 28, 2014.

⁴ On August 16, 2012 Dr. Lazio performed a lumbar laminectomy at L4-5. In a progress report dated September 11, 2012, Dr. Taylor noted that appellant underwent surgery on his lumbar spine three weeks earlier. He diagnosed “[l]umbar degenerative disc disease and disc herniations status postsurgical treatment...” In a report dated January 10, 2013, Dr. Lazio diagnosed status post exploration of a laminectomy and discectomy at L4-5 with postoperative symptoms.

⁵ In an undated statement received by OWCP on February 8, 2013, appellant related that his injury occurred taking a catheter sample from a “combative patient who kicked me during [the] procedure.”

In a September 16, 2013 addendum to her previous statement regarding the July 18, 2012 work incident, Ms. Walker related that she was holding the patient's left leg and that her right leg was not restrained. She stated:

“While trying to obtain catheterized urine specimen the patient was thrashing and flailing around and unwilling to cooperate with [the] procedure. [Appellant] was bent over at almost a 90-degree angle over [the] patient's side to try and find [her] urethra for [the] urine specimen. Due to [the] patient's excessive flatus I kept the patient's left leg restrained while [appellant] attempted catheterization but turned my head away due to the continuous flatus the patient was releasing....”

In a statement signed November 12, 2013, appellant related that he underwent a lumbar discectomy and laminectomy in July 2003 after a work injury and had surgery in December 2004 for a herniated disc at L5-S1 after a motor vehicle accident. On July 6, 2012 an elderly patient fell from his wheel chair into the street. Appellant turned him over and felt “a twinge of pain in my lumbar spine.” The pain was not severe and required no additional pain management. On July 18, 2012 appellant related that he was trying to get a urine sample from a mentally impaired but strong patient. He stated, “The procedure was made incredibly difficult due to her combativeness and unwillingness to disrobe at all for the procedure and she was physically and verbally resistant and morbidly obese.” Appellant bent over at an 80- to 90-degree angle trying to find the patient's urethra. He stated:

“she was getting very agitated and started thrashing around and then had to be restrained by her mother on her arms and Ms. Walker on her left leg. I inserted the catheter to obtain the urine specimen, but I could not hold down her right leg and knee at the same time. During this time, the patient kicked me with her right knee in the stomach several times, and she began to pass excessive amounts of bowel gas, which lasted until the procedure ended. The patient once kicked me so hard she almost lifted me off the floor.”

Appellant informed Ms. Walker that his back hurt, that he could not breathe and that he had to leave the room. His back pain worsened for 10 days until his supervisor sent him to the employing establishment's health clinic. Appellant stated, “Because I had had two different injuries, I was initially a bit confused about the cause of my back pain.” He related that on July 31, 2012 he told Dr. Taylor that the “primary incident was the injury of July 6, 2012 but also explained the July 18th incident.” Appellant indicated that on August 7, 2012 he filed traumatic injury claims for the incidents occurring on July 6 and 18, 2012. Regarding Ms. Walker's statements, he stated:

“The problem with [the statements] is that Ms. Walker was highly distracted by what she herself had to do (restrain the patient's left leg while talking to her), the lack of clean air in the room and her need to turn her head away from the patient to breath. In additional, while the kicks from the patient's right knee shifted and jarred me, I did not know at that point the degree of damage down to my spine, although I felt very, very achy, with radiating pain down both legs and a severe limp.

“I should note here that due to the highly intense, unpleasant, sensitive and difficult nature of the conditions surrounding the July 18, 201[2] incident, not to mention the anguish it has caused me, I have found it very difficult to relate this incident, write or talk about it. Ms. Walker has experienced similar issues. This is the first time I have really been able to put the information down in writing. In any case, the hospital never actually controverted my injury, which is shown in their MSPB [Merit Systems Protection Board] brief as uploaded. I do not see why accepting my word should be so difficult for OWCP. The bottom line is that while I had injuries on July 6 and July 18, 2012, the July 18, 2012 injury has been overwhelmingly more painful and problematic than the July 6, 2012 injury. I am therefore not appealing the July 6, 2012 injury, because it ceased to be a principal issue after July 18, 2012.”

Appellant submitted an August 27, 2013 MSPB settlement agreement. The employing establishment agreed to accept his “voluntary resignation for medical reasons,” cancel its removal action, and change his absent without leave status from October 2, 2012 until April 1, 2013 to leave without pay.

On February 27, 2014 appellant requested reconsideration. In a decision dated May 8, 2014, OWCP denied modification of its March 8, 2013 decision. It found that he had not established the occurrence of the alleged July 18, 2012 employment incident. OWCP further determined that the medical evidence submitted was from a physician assistant and thus of no probative value.

On appeal appellant’s counsel describes his history of prior work injuries, the July 18, 2012 work incident, and his subsequent medical treatment. He argues that Ms. Walker did not witness all of the events on July 18, 2012 because she turned her head away. Counsel relates that appellant was initially unclear whether the July 6 or 18, 2012 work incident resulted in his condition. He notes that a statement from a claimant that an injury occurred is of significant probative value. Counsel further contends that the medical evidence is sufficient to establish an injury due to the July 18, 2012 employment incident.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁶ 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.⁷ 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.⁸

⁶ 5 U.S.C. § 8101 *et seq.*

⁷ *Alvin V. Gadd*, 57 ECAB 172 (2005); *Anthony P. Silva*, 55 ECAB 179 (2003).

⁸ *See Elizabeth H. Kramm (Leonard O. Kramm)*, 57 ECAB 117 (2005); *Ellen L. Noble*, 55 ECAB 530 (2004).

To determine whether an employee sustained a traumatic injury in the performance of duty, OWCP must determine whether “fact of injury” is established. First, an employee has the burden of demonstrating the occurrence of an injury at the time, place, and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.⁹ Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish a causal relationship between the employment incident and the alleged disability and/or condition for which compensation is claimed.¹⁰ An employee may establish that the employment incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident.¹¹

In order to determine whether an employee actually sustained an 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 which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.¹² An injury does not have to be confirmed by eyewitnesses in order to establish 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.¹³ An employee has not met his or her burden of proof of 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.¹⁴ 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 doubt on an employee’s statements in determining whether time, place, and manner have been established.¹⁵ However, an employee’s statement regarding the occurrence of an employment incident is of great probative force and will stand unless refuted by strong or persuasive evidence.¹⁶

ANALYSIS

Appellant alleged that he injured his lower back on July 18, 2012 catheterizing a combative patient. He related that in 2003 he had a lumbar discectomy and laminectomy and in 2004 he underwent back surgery for a herniated L5-S1 disc after a motor vehicle accident. On July 6, 2012 at work appellant helped a patient who had fallen from his wheelchair and felt slight

⁹ *David Apgar*, 57 ECAB 137 (2005); *Delphyne L. Glover*, 51 ECAB 146 (1999).

¹⁰ *Gary J. Watling*, 52 ECAB 278 (2001); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

¹¹ *Id.*

¹² *See Louise F. Garnett*, 47 ECAB 639 (1996).

¹³ *See Betty J. Smith*, 54 ECAB 174 (2002).

¹⁴ *Id.*

¹⁵ *Linda S. Christian*, 46 ECAB 598 (1995).

¹⁶ *Gregory J. Reser*, 57 ECAB 277 (2005).

lumbar pain. On July 18, 2012 he attempted to obtain a urine sample using a catheter on a mentally impaired patient who was flailing around and needed to be restrained. Appellant bent over at an 80- or 90-degree angle and tried to hold one of her legs down to get the specimen but she kicked him in the stomach multiple times. He experienced back pain that worsened with time. Appellant indicated that when he sought medical treatment on July 31, 2012 he described both the July 6 and 18, 2012 incidents to Dr. Taylor.

The employing establishment controverted the claim. In a statement dated July 31, 2012, Ms. Lucero, appellant's supervisor, related that on July 30, 2012 she asked him why he was limping and he told her that he injured his back helping a patient in the coffee shop about three months earlier. Appellant also told her that the back pain increased after he lifted a patient onto an examination table. In a statement dated August 9, 2012, Ms. Lucero related that appellant did not limp or complain of back pain prior to July 30, 2012.

The Board finds that the evidence does not contain inconsistencies sufficient to cast serious doubt on appellant's version of the employment incident. At the time appellant sought treatment at the employing establishment's clinic on July 31, 2012, he related a history of work injuries on both July 6 and 18, 2012. On August 1, 2012 he advised Dr. Taylor that he injured his back on July 6, 2012 helping a patient who had fallen out of a wheelchair. Appellant did not mention the July 18, 2012 injury. He subsequently explained, however, that he was initially uncertain which injury caused his back pain. The medical reports from Dr. Lazio contain a detailed history of the July 18, 2012 work incident. On August 8, 2012 appellant advised Ms. Lucero that he sustained injuries when he helped a patient who fell and assisted at a catheterization. On August 9, 2012 he told her that he had walked with an unusual gait in the two weeks since obtaining the catheterization specimen because he had impingement on his spinal cord.

As discussed, 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 and persuasive evidence.¹⁷ While appellant did not inform his supervisor on July 30, 2012 of the circumstances surrounding his injury, in a subsequent statement he related that he found the incident difficult to discuss due to its unpleasant nature. There is further considerable evidence supporting the occurrence of the July 18, 2012 work incident. In a statement dated August 8, 2012, Ms. Walker, a coworker, related that appellant obtained a urine specimen from a patient who was thrashing about and hysterical. On September 16, 2013 she confirmed that appellant was bent over trying to get the urine specimen from the combative patient. Ms. Walker indicated that she restrained one of the patient's legs but kept her head turned away from the catheterization because of the patient's excessive flatulence. The employing establishment did not dispute that appellant catheterized an uncooperative patient on July 18, 2012. Under the circumstances of this case, the Board finds that his allegations have not been refuted by strong or persuasive evidence.¹⁸ The Board, therefore, finds that the evidence is sufficient to establish that the July 18, 2012 incident occurred at the time, place, and in the manner alleged.

¹⁷ *D.S.*, Docket No. 11-634 (issued October 5, 2011); *Allen C. Hundley*, 53 ECAB 551 (2002).

¹⁸ *See M.H.*, 59 ECAB 461 (2008).

As OWCP denied appellant's claim on the grounds that he did not establish the occurrence of the July 18, 2012 employment incident, it did not fully consider the medical evidence.¹⁹ The case will be remanded to OWCP for evaluation of the medical evidence to determine whether he sustained a medical condition and disability due to the July 18, 2012 work incident. After such further development as deemed necessary, it should issue a *de novo* decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the May 8, 2014 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further proceedings consistent with this decision of the Board.

Issued: March 24, 2015
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

¹⁹ OWCP noted its May 8, 2014 decision that the chiropractor's reports were of no probative value. It did not consider the other medical evidence of record.