United States Department of Labor
Employees' Compensation Appeals Board

R.B., Appellant	)	
and	)	**Docket No. 11-1382**
	)	**Issued: February 9, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Seattle, WA, Employer	)	

Appearances:
Howard L. Graham, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 20, 2011 appellant, through his attorney, filed a timely appeal from a March 17, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained a right elbow and right shoulder injury in the performance of duty on November 20, 2009 as alleged.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that, following the issuance of the March 17, 2011 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c)(1).

On appeal, appellant's attorney contends that appellant presented a *prima facie* claim and OWCP improperly placed the burden of proof on him to establish that the fall was not the result of an idiopathic condition.

FACTUAL HISTORY

On November 20, 2009 appellant, then a 62-year-old driver, filed a traumatic injury claim (Form CA-1) alleging that he sustained a right elbow and right shoulder injury as a result of a fall while loading mail hampers onto a truck in the performance of duty that same day. He visited the emergency room on November 20, 2009 and was discharged with instructions to return to work in three days.

In a November 21, 2009 report, Dr. Jiakun Wang, a Board-certified internist, diagnosed syncope, four episodes and bradycardia. He reported that appellant presented to the emergency room with episodes of fainting four times in the past two days. Appellant described that he had passed out when he was loading mail at work. There were no witnesses when he fell and sustained a right shoulder injury. Appellant went home and then visited another emergency room where he had a negative chest x-ray. He was diagnosed with right shoulder contusion and discharged. Thereafter, appellant had four syncopal episodes, three of which were witnessed by his family who described them as lightheadedness and lots of consciousness over a two- or three-minute period. Dr. Wang indicated that appellant had a positive family history of cardiovascular issues. Appellant's father died of sudden cardiac arrest at the age of 54 and he had a brother who had bypass surgery.

In a November 25, 2009 report, Dr. Samakshi Krishna, a Board-certified internist, diagnosed syncope, unclear etiology and right shoulder impingement syndrome. She reported that appellant was admitted for recurrent syncope and was initially found to be somewhat bradycardic, however, he was seen by a cardiologist who thought that his symptoms were not related to bradycardia and recommended a stress test. The stress test was negative. An echocardiogram, an electroencephalogram and a magnetic resonance imaging scan of the brain were all unremarkable. Dr. Krishna indicated that appellant complained of pain in his right shoulder which seemed to have happened after he had a fall secondary to syncope. An x-ray of the shoulder did not show any evidence of acute fracture, but did show presence of shoulder impingement. Dr. Krishna opined that the pain could be secondary to the impingement, noting that appellant had history of right shoulder pain from the past.

In a December 2, 2009 attending physician's report Dr. Maureen Johnson, a physician Board-certified in internal and occupational medicine, diagnosed contusion of elbow, abrasion of upper arm without infection, sprain and strain of other specified sites of shoulder and upper arm, syncope and collapse, unspecified sleep disturbance neural trauma and weakness of right arm. She indicated that appellant fell from standing on the lift-gate of a truck landing on the floor on his right shoulder, arm and side. Dr. Johnson opined that the injury occurred as a direct result of the fall from the truck at work. She remarked that appellant fainted after taking medication given to him by the emergency room (cyclobenzaprine) which may have caused the syncope.

In progress notes dated December 2, 2009, Dr. Johnson further explained that appellant fell on November 20, 2009 off the tailgate of his truck while loading. Appellant fell in between

the truck and the ramp onto the floor, landing on his right side, with initial impact to the right shoulder and elbow. He completed his work shift and his supervisor took him to the emergency room. X-rays were negative and appellant was given oxycodone and cyclobenzaprine. Appellant went home and was advised not to work for three days. The night, after taking the medications, he arose, went to the bathroom and had a syncope episode. Appellant tried to arise and fell again with occurring syncope several times. His family took him to a hospital where he was diagnosed with syncope and stayed for four nights and five days. Dr. Johnson indicated that appellant did not have a history of heart disease or prior syncope and no cause was identified. Appellant was advised that there was no statement made about the medication and its relationship to the syncope. He was advised on discharge to discontinue use of the cyclobenzaprine, as it could cause side effects, potentially even contributing to syncope.

On December 7, 2009 Dr. Allison M. Smith, a Board-certified radiologist, diagnosed full-thickness rotator cuff tear.

In progress notes dated December 8, 2009, Timothy Hunter, a physician's assistant, diagnosed right shoulder rotator cuff tear. He stated that appellant fell at work on November 20, 2009 but indicated that "[i]t was unclear whether [he] slipped on his truck or had a syncopal episode" and noted that he had several syncopal episodes later that day and was hospitalized for four nights.

On January 19, 2010 appellant requested authorization of right arthroscopic rotator cuff repair surgery.

By letter dated January 19, 2010, OWCP informed appellant that his claim was originally received as a simple, uncontroverted case administratively handled to allowed medical payments up to $1,500.00. However, since his physician was requesting surgery, it would formally consider the merits of the claim. After review, OWCP found that the evidence of record failed to establish that the incident occurred as alleged, that appellant was injured while in the performance of duty and causal relationship between his fainting condition and activities of his federal employment. It allotted 30 days for him to submit additional evidence and respond to its inquiries.

Subsequently, appellant submitted a January 6, 2010 report by Dr. Johnson who diagnosed rotator cuff tear, sprain and strain of other specified sites of shoulder and upper arm and adverse drug effect. Dr. Johnson indicated that his condition had not improved and opined that he needed surgery.

On January 25, 2010 Dr. Jamie R. Antoine, a Board-certified orthopedic surgeon, diagnosed right full-thickness rotator cuff tear and grade 2 acromioclavicular (AC) joint separation. Appellant denied any previous history of difficulties with his shoulder.

In a February 2, 2010 witness statement, appellant's coworkers, Connie Godman and Rosemary Donaghue, reported that they were the first to speak to appellant about the fall he had from the back lift gate of his truck. Appellant told them that he had tried to grab the rail on the dock but was unable to and fell off the tailgate onto the cement.

In a February 4, 2010 report, Dr. Johnson reported that appellant had no fainting at the time of the fall but became "off balance" and slipped and fell off the elevated truck lift on which he was standing. Appellant stated that his shoes were wet from the wet pavement at the time. He fell two and a half feet off the lift of his truck. The awkward forward reach from the position appellant was standing astride the hampers caused him to lose his balance as he reached for the lift control to raise the lift. Appellant needed to elevate the lift to the level of the truck bed in order to move the hampers onto the truck bed. As for the syncopal episodes, they did not occur until after the employment incident and he was discharged from the emergency room.

Dr. Johnson opined that the syncopal episode was possibly related to the medical or micturition, the act of urinating. She opined that the medication, combined with the severe pain from the AC joint separation and the rotator cuff tear, provide a physiologic explanation for appellant to have experienced the syncopal episodes on November 21, 2009. Dr. Johnson reiterated that a syncopal episode did not cause his fall at work and noted that there was a communication difficulty in conversing with him due to his accent. She opined that any indication that a syncopal episode causing his fall was a misunderstanding of what appellant meant which may have been accepted in the original medical history and repeated in following progress notes. Appellant denied any fainting or syncope associated with his fall from the truck on November 20, 2009.

In a February 9, 2010 narrative statement, appellant reported that he moved a hamper from the dock to the lift gate of the truck. When he tried to use the activation switch to load the mail on the truck he lost his balance and fell down. At the time the floor was wet. Appellant stated that he fell four feet and landed on the side of his body.

In a November 22, 2009 report, Dr. Venkatesh R. Kandallu, a physician Board-certified in cardiovascular disease, diagnosed recurrent brief syncopal episodes. He indicated a family history of premature coronary artery disease and nonspecific electrocardiogram changes. Dr. Kandallu reported that appellant had a few episodes of brief syncope in the last two days. He indicated that on November 20, 2009 appellant passed out and landed on his right shoulder while loading mail. Appellant did not recall having any prodromal symptoms. According to Dr. Kandallu, appellant found himself on the floor and picked himself up. His right shoulder was painful and he, therefore, concluded that he had landed on his right shoulder.

By decision dated March 4, 2010, OWCP denied appellant's claim on the basis that the evidence he submitted was not sufficient to establish that the described employment incident occurred as alleged. It found that four different accounts of the history of the injury given by appellant's treating physicians within days of each other and a nonoccupational pathology syncope (fainting spells) which was not found to be causally related to his federal employment were sufficient to cast serious doubt as to whether the injury occurred at the time, place and in the manner alleged.

On March 29, 2010 appellant, through his attorney, requested an oral hearing *via* telephone and submitted additional evidence, including a March 25, 2010 report by Dr. Johnson reiterating that his fall was not caused by a syncopal episode and addendums by Drs. Krishna and Wang amending appellant's medical history. In an April 8, 2010 report, Dr. Krishna stated that appellant did not have syncope at work but a slip and fall. In an April 28, 2010 report,

Dr. Wang stated that appellant and his family members reported that he only had two episodes of syncope before coming to visit the emergency room. Prior to the emergency room visit, appellant reported to have right shoulder contusion and no other prior medical history.

On July 19, 2010 a telephonic hearing was held before an OWCP hearing representative. Appellant testified that on November 20, 2009 he was loading mail hampers on the tailgate of his truck. He was on the tailgate when the hamper moved forward and he could not control it and then he fell down. Appellant did not tell his supervisor or anybody else at that time that he fainted or passed out. He took the truck back to his station and told his supervisor that he fell down on the tailgate when he was loading the hamper. Appellant testified that he had an episode of fainting after the employment incident in the morning at home on November 21, 2009 and never before. Appellant's attorney acknowledged the controversy over whether, in fact, appellant passed out and fell or whether he slipped and fell and argued that it was irrelevant because the mechanism of injury was the tailgate which is a clear part of his job and a factor of his federal employment. The hearing representative granted appellant's request to hold the case open for 30 days for submission of additional medical evidence.

Subsequently, appellant submitted an August 3, 2010 report by Dr. Johnson reiterating that he fell from the tailgate of his truck while in the performance of duty and sustained a right shoulder injury and an August 6, 2010 report by Dr. Antoine who diagnosed right shoulder traumatic rotator cuff tear related to an employment injury with the mechanism of injury being his initial fall when he hit the tailgate at work.

In an August 13, 2010 letter, the employing establishment provided a statement which refuted appellant's alleged injury and how it occurred. It attached exhibits of photographs demonstrating the loading process and explained that the driver rolls the mail containers onto the lift gate and steps on a tab on the lift gate that causes a small retainer to rise which locks the hamper wheels in place securing them. The driver stands on the lift gate between the hamper or hampers and the back of the truck and activates the lift control. Once the lift gate reaches the level of the truck bed, the driver rolls the hampers into the truck. If the driver failed to raise the stop to secure the hampers and they rolled, it would be possible for the hampers to fall off the lift gate which could cause a serious injury. However, in appellant's case, the hampers did not fall or even roll off the lift gate. In fact, the employing establishment noted that he finished loading the hampers, stowed the lift gate and, according to his testimony, took the truck back to his station after the accident.[3] If appellant was standing on the lift gate, activating the switch, he would have been stationary and not likely to slip. If he fell as claimed, the possibility of a fainting incident becomes more likely, according to the employing establishment.

By decision dated September 21, 2010, an OWCP hearing representative affirmed the March 4, 2010 decision on the grounds that due to inconsistencies in the presentation of the factual and medical history, appellant failed to establish fact of injury. The hearing representative noted that at the hearing appellant testified that he fell down on the tailgate whereas he had previously indicated that he fell a few feet to the ground below.

[3] OWCP hearing transcript, p.14, lines 3-5.

In an October 14, 2010 report, Dr. Johnson reported that appellant fell three to four feet from the elevated gate of his truck while in the performance of duty and denied any symptoms or problems related to dizziness or syncope prior to or at the time of the fall.

On January 31, 2011 appellant, through his attorney, requested reconsideration.

By decision dated March 17, 2011, OWCP denied modification of its September 21, 2010 decision on the basis that the evidence submitted was not sufficient to establish that the November 20, 2009 incident occurred as alleged. It noted that whether the alleged fall was idiopathic in nature was not germane to the issue at hand which was whether appellant sustained an injury at the time, place and in the manner alleged. OWCP found that there was no evidence which clearly established how the injury occurred and noted that he himself presented different versions of how the injury occurred.

LEGAL PRECEDENT

An employee seeking benefits under FECA[4] 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 timely filed within the applicable time limitation period of FECA, that an injury[5] 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]

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. A fact of injury determination is based on two elements. 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. 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. An employee may establish that the employment incident occurred as alleged but fail to show that his or her condition relates to the employment incident.[7]

An injury does not have to be confirmed by eyewitnesses in order to establish the fact that an employee sustained an injury while in the performance of duty. However, the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.[8] Such circumstances as late notification of injury, lack of

[4] 5 U.S.C. §§ 8101-8193.

[5] OWCP's regulations define a traumatic injury as a condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member or function of the body affected. 20 C.F.R. § 10.5(ee).

[6] *T.H.*, 59 ECAB 388 (2008). *See Steven S. Saleh*, 55 ECAB 169 (2003); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[7] *Id. See Shirley A. Temple*, 48 ECAB 404 (1997); *John J. Carlone*, 41 ECAB 354 (1989).

[8] *See Mary Jo Coppolino*, 43 ECAB 988 (1992).

confirmation of injury, continuing to work without apparent difficulty following the alleged injury and failure to obtain medical treatment may cast doubt on an employee's statements in determining whether he or she has established a *prima facie* claim for compensation. The employee has the burden of establishing the occurrence of an alleged injury at the time, place and in the manner alleged by a preponderance of the evidence.[9] An employee has not met this burden when there are such inconsistencies in the evidence that cast serious doubt upon the validity of the claim. However, 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.[10]

ANALYSIS

The Board finds that appellant did not meet his burden of proof in establishing that on November 20, 2009 he sustained a right elbow and right shoulder injury as a result of a fall while loading mail hampers onto a truck. As noted above, the first element of fact of injury requires that appellant submit evidence establishing that an incident occurred at the time, place and in the manner alleged. Appellant reported that he was alone while loading the mail hampers onto his truck. As he was alone at the time the incident occurred and there were no eyewitnesses, his statement alleging that an injury occurred at a given time and in a given manner is of great probative value.[11] However, the Board finds that there are such inconsistencies in the evidence to cast doubt upon the validity of appellant's claim.

There are unresolved discrepancies regarding the manner in which the alleged employment incident of November 20, 2009 occurred. Dr. Johnson indicated that appellant fell in between the truck and the ramp onto the floor. She stated that he reported that his shoes were wet from the wet pavement at the time and he fell two and a half feet off the lift of his truck. However, on October 14, 2010 Dr. Johnson reported that appellant fell three to four feet from the elevated gate of his truck and in his February 9, 2010 narrative statement he reported that he fell four feet. In a February 2, 2010 witness statement, appellant's coworkers, Ms. Godman and Ms. Donaghue, reported that he told them that he had tried to grab the rail on the dock but was unable to and fell off the tailgate onto the cement. Yet, on July 19, 2010 appellant testified that he fell down on the tailgate when he was loading the hamper. The Board finds that it is not clear whether he fell off of the truck onto the ground and if so how far he fell or if he slipped and fell onto the tailgate of the truck.

During the July 19, 2010 oral hearing, appellant testified that on November 20, 2009 he was loading mail hampers on the tailgate of his truck. He was on the tailgate when the hamper moved forward and he could not control it and then he fell down. Subsequently, appellant took the truck back to his station. On August 13, 2010 the employing establishment refuted his alleged injury and how it occurred. It explained that if the driver failed to raise the stop to secure the hampers and they rolled, it would be possible for the hampers to fall off the lift gate which

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[9] *See R.T.* Docket No. 08-408 (issued December 16, 2008).

[10] *See Allen C. Hundley*, 53 ECAB 551 (2002); *Earl David Seal*, 49 ECAB 152 (1997).

[11] *Id.*

could cause a serious injury. However, in the instant case appellant did not indicate that the hampers fell or even rolled off the lift gate. In fact, the employing establishment noted that he finished loading the hampers, stowed the lift gate and, according to his testimony, took the truck back to his station after the accident. If appellant was standing on the lift gate, activating the switch, he would have been stationary and not likely to slip. If he fell as claimed, the possibility of a fainting incident becomes more likely, according to the employing establishment.

Although Drs. Wang and Krishna amended their reports to say that appellant did not have a syncopal episode but a slip and fall, Dr. Kandallu did not retract his diagnosis of recurrent brief syncopal episodes. In his November 22, 2009 report, Dr. Kandallu indicated that on November 20, 2009 appellant passed out and landed on his right shoulder while loading mail. According to him, appellant did not recall having any prodromal symptoms, found himself on the floor and picked himself up. Appellant's right shoulder was painful and he, therefore, concluded that he had landed on his right shoulder. However, Dr. Johnson and appellant repeatedly stated that he did not experience a syncopal episode prior to his fall on November 20, 2009.

The supervisor and witness statements, Dr. Johnson's reports, Dr. Kandallu's reports and appellant's own statements are inconsistent with the surrounding facts and circumstances.[12] Appellant has not reconciled these contradictions in the record. Moreover, he completed his work shift after the alleged incident before his supervisor took him to the emergency room.

The evidence submitted contains such inconsistencies as to cast doubt on the validity of appellant's claim. Accordingly, the Board finds that appellant has not met his burden of proof in establishing that he experienced an employment-related incident at the time, place and in the manner alleged.[13]

On appeal, appellant's attorney contends that appellant presented a *prima facie* claim and OWCP improperly placed the burden of proof on him to establish that the fall was not the result

[12] *Cf. S.A.*, Docket No. 10-1786 (issued May 4, 2011) (where the Board found that appellant established that the incident occurred as alleged, as there were no inconsistent statements from him or other evidence refuting the occurrence of the alleged incident).

[13] Given that appellant did not establish an employment incident, further consideration of the medical evidence is unnecessary. *See Bonnie A. Contreras*, 57 ECAB 364, 368 n.10 (2006).

of an idiopathic condition.[14] By decision dated March 17, 2011, OWCP denied his claim on the basis that the evidence was insufficient to establish that the November 20, 2009 incident occurred as alleged. Although it clearly indicated that whether the alleged fall was idiopathic in nature was not the issue at hand, as noted above, appellant has the burden of proof to establish that the incident occurred in the time, place and in the manner alleged, which he did not do because of the inconsistencies in the manner in which the alleged injury occurred. The incident has been variously described as he slipped and fell on the tailgate of the truck, fell in between the truck onto the floor, fell off the truck due to syncopal episode, experienced syncopal episode after the fall. For the reasons stated above, the Board finds that the attorney's argument is not substantiated.

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 submitted sufficient evidence to establish that the November 20, 2009 employment incident occurred as alleged.

[14] Where a personal, nonoccupational pathology causes an employee to collapse and to suffer injury upon striking the immediate supporting surface and there is no intervention or contribution by any hazard or special condition of the employment, the injury is not a personal injury while in the performance of duty as it does not arise out of a risk connected with the employment. *John R. Black,* 49 ECAB 624, 626 (1998). An unexplained fall that is not established as due to an idiopathic condition is compensable. *See M.D.,* Docket No. 11-418 (issued September 27, 2011).

ORDER

IT IS HEREBY ORDERED THAT the March 17, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 9, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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