

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

S.J., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Albuquerque, NM, Employer**

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**Docket No. 11-886
Issued: January 27, 2012**

Appearances:

*Alan J. Shapiro, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On February 15, 2011 appellant, through his attorney, filed a timely appeal from a January 12, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 sustained a left shoulder injury on April 20, 2010 at the time, place and in the manner alleged.

FACTUAL HISTORY

On April 23, 2010 appellant, a 49-year-old mail handler, filed a Form CA-1 claim for benefits, alleging that he experienced pain in his left shoulder and the left side of his chest while engaging in lifting, loading, sweeping and preparing flat mail on April 19, 2010.

¹ 5 U.S.C. § 8101 *et seq.*

In a statement received by OWCP on April 28, 2010, Manager Renee Chenee noted that on April 20, 2010, at approximately 3:10 p.m., appellant told her that he was having chest pains. She called 911 and an ambulance arrived at the worksite. When the paramedics arrived appellant appeared confused and lightheaded with pain in his chest and numbness in his legs. He told the paramedics that he felt similar to when he previously experienced angina. Appellant advised that he was on medication for high blood pressure. Ms. Chenee stated that an ambulance took him to the emergency room.

On April 27, 2010 Supervisor Luther Martinez stated that he saw appellant on April 20, 2010 at approximately 3:20 p.m. in the manager's office. Appellant complained of chest and shoulder pain radiating down to his groin. Mr. Martinez immediately notified the worksite manager, who called 911. He stated that appellant appeared apprehensive and was guarding his trunk area. The emergency personnel arrived a short time later.

In a Form CA-17 report dated May 6, 2010, it was noted that appellant had sustained an injury at work on April 20, 2010 while prepping, sweeping and loading.

A treatment note was received by OWCP on May 18, 2010 which indicated that appellant was taken to the hospital and evaluated on April 20, 2010.

In a May 27, 2010 report, Dr. Melvin Romero, a Board-certified family practitioner, stated that appellant had a history of left shoulder pain since April 2010. He related that appellant believed that he injured his shoulder at work while engaged in heavy lifting, carrying and other work duties. Dr. Romero recommended that appellant undergo a magnetic resonance imaging (MRI) scan. Appellant also had neck tightness and a spasm with movement of the left shoulder. Dr. Romero advised that appellant's etiology could be attributable to an intra-articular injury due to heavy lifting and significant use daily at work. In progress reports dated from June to August 2010, he reiterated his findings and conclusions and stated that the etiology of appellant's left shoulder condition was musculoskeletal.

By letter dated June 24, 2010, OWCP advised appellant that he needed to submit additional factual and medical evidence in support of his claim, including a comprehensive medical report from his treating physician. Appellant was provided 30 days to submit the requested information.

A hospital emergency report dated April 20, 2010, received by OWCP on June 29, 2010, noted that appellant stated that he had an acute onset of substernal chest pain at 3:15 p.m. while working at the employing establishment. Appellant experienced dizziness, dyspnea and nausea. He advised that his pain was consistent with an episode in 2004 when he had to have a cardiac catheterization. The pain radiated to appellant's left shoulder, upper back, lower back and groin.

By decision dated August 3, 2010, OWCP denied appellant's claim finding that the evidence was insufficient to establish that the claimed medical condition was causally related to the identified employment activities.

By letter dated August 6, 2010, appellant's attorney requested an oral hearing, which was held on November 3, 2010.

A physical therapy report dated July 26, 2010, received by OWCP on November 8, 2010 stated that appellant had complained of left shoulder, chest and upper back pain which began to progressively increase as of April 19, 2010. Appellant noticed that the pain was steadily increasing for the prior two weeks, but became so severe that he went to the hospital due to his history of having a heart condition. He stated his belief that the injury may have occurred at work.

In a Form CA-17 report dated August 5, 2010, Dr. Romero advised that appellant sustained an injury to his left shoulder/chest while lifting, prepping, loading and sweeping flats at work. He noted left shoulder pain with limited range of motion and diagnosed left shoulder tendinitis. Dr. Romero checked a box indicating that appellant's description of symptoms corresponded with the history of injury.

In an August 10, 2010 report, Dr. Romero stated that appellant continued to experience left shoulder discomfort and pain. When he first examined appellant, there was significant pain and discomfort in the left anterior shoulder with left posterior shoulder pain. Appellant stated that his pain was directly related to work-based activity.

In a September 27, 2010 statement, appellant asserted that on April 20, 2010² at about 2:00 p.m. he began to feel very warm, light headed and experienced sharp pain in his left chest. He worked for another 10 minutes and then his symptoms worsened. Appellant went to his manager's office to report his condition and to receive assistance. After spending the night at the hospital, he was released the next morning and cleared of having any heart-related problems. Appellant stated that his injury occurred on April 20, 2010, while he was prepping mail. He indicated that he sustained a repetitive motion injury and noted that his treating physician, Dr. Romero, found that his injury was work related.

At the hearing, appellant initially stated that his work injury initially occurred on April 19, 2010; but amended this to April 20, 2010. He testified that approximately 30 to 45 minutes into his work shift, he was at the prepping area, reaching for a tub of mail going down an incline belt when he felt a stabbing pain in his left shoulder and chest area. Appellant attributed his injury to some type of repetitive motion activity. After being transported to the hospital, he underwent testing for a heart condition and was advised by a physician the next day that his symptoms were most likely musculoskeletal in origin.

By decision dated January 12, 2011, an OWCP hearing representative affirmed the August 3, 2010 decision denying appellant's claim. She modified the decision, finding that he had not established that the alleged April 20, 2010 incident occurred as alleged.

LEGAL PRECEDENT

An employee seeking benefits under FECA³ 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

² Appellant originally stated that his injury occurred on April 19, 2010; however, he crossed this out and wrote "April 20, 2010."

³ *Supra* note 1.

United States” within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, 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.⁴ 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.⁵

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.⁶ 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.⁷

OWCP 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,⁸ nor can it find fact of injury if the evidence fails to establish that the employee sustained an “injury” within the meaning of FECA. 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.⁹ 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 cause doubt on an employee’s statements in determining whether he has established his claim.¹⁰

ANALYSIS

OWCP’s hearing representative found that the record contained insufficient evidence to establish that the claimed April 20, 2010 event occurred at the time, place and in the manner alleged. The Board finds, however, that appellant presented sufficient evidence to establish that he

⁴ *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁵ *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁶ *John J. Carlone*, 41 ECAB 354 (1989).

⁷ *Id.* For a definition of the term “injury,” see 20 C.F.R. § 10.5(ee).

⁸ *Pendleton*, *supra* note 4.

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

¹⁰ See *Constance G. Patterson*, 41 ECAB 206 (1989).

experienced chest pain that day at the time, place and in the manner alleged.¹¹ Appellant, however, has not established that he sustained a left shoulder injury as a result of the incident.

Appellant filed the claim for an April 20, 2010 work incident in a timely fashion, on April 23, 2010, and sought medical attention on April 20, 2010, the day the incident occurred. Appellant's supervisor Mr. Martinez stated on April 27, 2010 that appellant approached him at approximately 3:20 p.m. on April 20, 2010, complaining of chest and shoulder pain radiating down to his groin. The April 20, 2010 hospital emergency report advised that appellant experienced substernal chest pain at 3:15 p.m. while standing at work that radiated to his left shoulder, upper back, lower back and groin. At the hearing, appellant testified that he was prepping mail on April 20, 2010, when he experienced a stabbing pain in his chest and left shoulder.

The Board has held that 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.¹² Appellant's statement that he experienced left shoulder pain on April 20, 2010 while prepping mail was not contradicted by any probative evidence of record. He sought medical attention at a local hospital emergency room on April 20, 2010, the date of the alleged incident and from Dr. Romero on May 27, 2010.

The Board finds that the totality of the evidence, which includes appellant's April 23, 2010 statement on his CA-1 form, the April 20, 2010 hospital emergency report and his supervisor's April 27, 2010 e-mail are sufficient to establish an incident occurred in the performance of duty on April 20, 2010. The employing establishment did not controvert the claim and provided statements from management which corroborated his assertion.¹³ The record contains no contemporaneous factual evidence sufficient to find that the claimed April 20, 2010 work incident did not occur as alleged.¹⁴ The Board finds that the evidence of record is sufficient to establish that appellant reached for a tub of mail on April 20, 2010, while prepping mail, at the time, place and in the manner alleged and experienced shoulder and chest pain.

The Board finds, however, that appellant failed to submit rationalized medical opinion evidence to establish how the claimed April 20, 2010 incident was competent to cause a left shoulder injury. In this regard, the Board has held that the mere fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.¹⁵

¹¹ *Id.*

¹² *Patterson, supra* note 10; *Thelma S. Buffington*, 34 ECAB 104 (1982).

¹³ While appellant erroneously stated in his CA-1 form and in his September 27, 2010 statement that his injury occurred on April 19, 2010, this error can be considered harmless. His error is outweighed by the fact that his supervisors witnessed him on April 20, 2010 experiencing pain, stopping work and being taken to the hospital emergency room, which also provided an April 20, 2010 report documenting that he was examined and treated for chest and shoulder pain on that date.

¹⁴ *See Thelma Rogers*, 42 ECAB 866 (1991).

¹⁵ *See Joe T. Williams*, 44 ECAB 518, 521 (1993).

On May 27, 2010 Dr. Romero advised, that appellant experienced left shoulder pain since April 2010. He did not provide any specific diagnosis of appellant's left shoulder condition. Dr. Romero indicated that appellant attributed his left shoulder condition to his work duties, which included heavy lifting, carrying and other activities. He stated that the etiology of appellant's left shoulder injury could have stemmed from an intraarticular injury caused by heavy lifting and significant daily use of the shoulder while at work. This opinion is speculative in nature. In an August 10, 2010 report, Dr. Romero reiterated that he had treated appellant for longstanding left shoulder discomfort and pain. During his initial examination, appellant had significant pain and discomfort in the left anterior and posterior shoulder regions, which he attributed to work-related activity.

The reports from Dr. Romero are of diminished probative value in that he did not provide a firm medical diagnosis of appellant's condition or explain with adequate medical rationale how any left shoulder condition was caused by the work incident of April 20, 2010.¹⁶ He summarily noted that appellant's left shoulder condition was causally related to the April 20, 2010 incident in which he was prepping mail. The weight of medical opinion is determined by the opportunity for and thoroughness of examination, the accuracy and completeness of physician's knowledge of the facts of the case, the medical history provided, the care of analysis manifested and the medical rationale expressed in support of stated conclusions. Appellant failed to provide a rationalized, probative medical opinion relating his current condition to any factors of his employment. Therefore, he failed to provide a medical report from a physician that the work incident of April 20, 2010 caused or contributed to the claimed left shoulder injury.

OWCP advised appellant of the evidence required to establish his claim; however, he failed to submit such evidence. Appellant, therefore, did not provide a medical opinion to sufficiently describe or explain the medical process through which the April 20, 2010 work incident would have caused the claimed injury.

The Board notes that OWCP did not adjudicate whether appellant's medical expenses incurred on April 20, 2010 are compensable. Ordinarily, the employing establishment will authorize treatment of a job-related injury by providing the employee a properly executed (Form CA-16) within four hours.¹⁷ In this case, the record does not contain a CA-16 form or any other authorization from OWCP for medical treatment. However, under section 8103 of FECA, OWCP has broad discretionary authority to approve unauthorized medical care which it finds necessary and reasonable in cases of emergency or other unusual circumstances.¹⁸

Appellant was transported by ambulance to a hospital emergency room from the employing establishment at the request of his supervisors, immediately after the April 20, 2010 incident. OWCP did not adjudicate whether emergency or unusual circumstances were present. Although it adjudicated and denied appellant's claim of injury, OWCP did not adjudicate the issue of whether he should be reimbursed for medical expenses incurred. OWCP is required to

¹⁶ *William C. Thomas*, 45 ECAB 591 (1994).

¹⁷ *Val D. Wynn*, 40 ECAB 666 (1989); *see also P.S.*, Docket No. 10-1560 (issued June 23, 2011).

¹⁸ 5 U.S.C. § 8103; 20 C.F.R. § 10.304.

exercise its discretion to determine whether medical care has been authorized or whether unauthorized medical care involved emergency or unusual circumstances and is, therefore, reimbursable regardless of whether the underlying claim for benefits has been accepted or denied. The case will be remanded for further development of this issue.

CONCLUSION

The Board finds that OWCP properly found that appellant failed to meet his burden of proof to establish that he sustained a left shoulder injury in the performance of duty on April 20, 2010. The case will be returned to OWCP for consideration of whether his medical expenses related to his treatment on April 20, 2010 should be reimbursed.

ORDER

IT IS HEREBY ORDERED THAT the January 12, 2011 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside and remanded for further development consistent with this decision.

Issued: January 27, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board