United States Department of Labor
Employees' Compensation Appeals Board

J.E., Appellant	)	
and	)	**Docket No. 11-1657**
	)	**Issued: March 20, 2012**
U.S. POSTAL SERVICE, PHILADELPHIA BULK MAIL CENTER, Philadelphia, PA, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 8, 2011 appellant, through his attorney, filed a timely appeal from an April 13, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) denying his traumatic injury claim. 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.

ISSUE

This issue is whether appellant sustained an injury on August 10, 2010 in the performance of duty.

FACTUAL HISTORY

On August 11, 2010 appellant, then a 45-year-old mail handler, filed a traumatic injury claim alleging that on August 10, 2010 he experienced pain and tingling in his shoulder and neck

[1] 5 U.S.C. § 8101 *et seq.*

after he pulled a container off a truck. He stopped work on August 11, 2010. The employing establishment controverted continuation of pay, arguing that appellant had a preexisting condition.

In an August 10, 2010 hospital report, appellant informed a nurse that he sustained pain in his shoulder and neck. The nurse noted that he was not a good historian, did not know when the pain started and related that it was "old." At the hospital, Dr. Irving Huber, Board-certified in internal and emergency medicine, stated that appellant related that he was "unloading a truck and developed acute pain [on the] left side of [the] neck to left arm." Dr. Huber discussed a history of a prior anterior cervical fusion.

On August 11, 2010 Dr. Charles M. Bolno, an osteopath, evaluated appellant for severe pain in the cervical spine and both shoulders. He stated:

> "[Appellant] was pushing containers of mail out of trailers on August 10, 2010 at approximately 8:45 p.m. when he injured himself and experienced severe burning pain in the cervical spine with radicular pain in both arms. He had severe numbness and parasthesias in both shoulder[s] and both arms. The pain was so intense that he had to be taken to the emergency room…."

Dr. Bolno diagnosed acute traumatic cervical radiculopathy and cervical sprain and strain, post-traumatic herniated cervical disc, bilateral post-traumatic bilateral carpal tunnel syndrome, post-traumatic tenosynovitis and a bilateral rotator cuff injury.

In a statement dated August 12, 2010, Frank Pierantozzi, a supervisor, related that on August 10, 2010 he witnessed appellant "sweating profusely and complaining of pain in his shoulder and arm. I asked him what he did and he replied "'nothing[;]' he [stated that] he had some tingling in his arm." Mr. Pierantozzi called an ambulance. Appellant's blood pressure was very high.

In an August 18, 2010 e-mail, Mylin S. Batipps, a supervisor, related that appellant was off work from July 24 to August 10, 2010. On August 10, 2010 he witnessed appellant standing alone apparently in pain. Mr. Batipps asked what had happened and appellant told him that he did not know. The following day appellant claimed that he sustained a work injury. Mr. Batipps stated, "Never once did [appellant] state to anyone that he hurt himself unloading OTR [over-the-road containers] from the trailer."

In a September 14, 2010 duty status report, Dr. Bolno advised that appellant was disabled from employment. In an accompanying narrative report of the same date, he related that he was treating appellant for "injuries sustained at work on August 10, 2010." Dr. Bolno diagnosed bilateral rotator cuff injuries and acute radiculopathy and advised that appellant was totally disabled from employment. He stated, "[Appellant's] injuries are a direct result of what happened on August 10, 2010 when he was working at the bulk mail center for the [employing establishment]."

By decision dated September 28, 2010, OWCP denied appellant's claim finding that he had not established an injury at the time, place and in the manner alleged. It further found that

the medical evidence was insufficient to show that he sustained a condition due to the alleged work incident.

On October 1, 2010 appellant requested an oral hearing before an OWCP hearing representative. He submitted a September 7, 2010 magnetic resonance imaging (MRI) scan study of the cervical spine showing mild foraminal encroachment at C3-4, mild degenerative changes at C4-5 and C5-6 and an anterior cervical fusion at C6-7. A September 13, 2010 MRI scan study of the left shoulder showed a possible labral tear but no rotator cuff tear. In a letter dated August 9, 2010, Dr. Bolno diagnosed cervical radiculopathy, bilateral carpal tunnel syndrome and ulnar compression neuropathy and found that appellant could resume work on August 10, 2010.

In a report dated February 3, 2011, Dr. Bolno discussed appellant's history of a 2002 injury to his left shoulder and a 2005 work injury which resulted in a cervical fusion. He described the August 10, 2010 work incident and the findings on physical examination of "severe spasm of the paraverteral muscles of the cervical spine from C2 to 7 with restricted ranges of motion of the cervical spine and left shoulder." Dr. Bolno opined that appellant was totally disabled. He stated:

> "The extensive nature of the work that [appellant] was performing at the time of his injury and the excessive amount of weight that he was lifting and pushing related to the containers of mail not only aggravated a preexisting condition that result[ed] in a fusion of his cervical spine but caused a new cervical radiculopathy in his neck with an acute labral tear in his shoulder. There is no doubt that the repetitive nature of his work resulted in his carpal tunnel syndrome and ulnar nerve compression syndrome. There is no doubt that [appellant's] injuries prevent him from performing his duties at this time…. There is no doubt that the numbness and parathesias in the left arm are a direct result of the work-related injury on August 10, 2010 and the resulting weakness and severe pain in the left shoulder is related to the heavy lifting and pushing that he was doing on August 10, 2010 resulted in a tear of the glenoid labrum. These injuries prevent him from performing his duties now as they have since the initial injury. There is no doubt that [appellant] is totally disabled and will remain so in the future."

At the hearing, held on February 14, 2011, appellant described prior injuries to his neck in 2005 and his left shoulder in 2002. He underwent a cervical fusion in 2006. OWCP denied appellant's prior claim for a neck injury. Appellant returned to his regular duty but stopped work in the middle of July 2010 due to a stomach ailment. On August 10, 2010 when he returned to work, he grabbed a container and felt a sharp pain in his shoulder. A coworker asked appellant if he was injured but he "left it go" because they had additional containers to offload and he thought he could "shake it off." The pain increased so appellant told his supervisor, Mr. Batipps and emergency workers that he "pulled something." He did not inform his supervisor of his injury because the supervisor "never asked me directly what happened." Appellant was "foggy" at the hospital due to medications.

In an undated statement received March 25, 2011, Paul Searles related that on August 10, 2010 he and three coworkers were unloading containers from a truck. He saw appellant grab a

container and "flinch" so Mr. Searles took the container from him and asked if he was okay. Appellant told him that he thought he would be okay and they continued unloading the truck. Mr. Searles stated, "When we were finished [appellant] just started walking around the dock like he was trying to walk it off."

By decision dated April 13, 2011, the hearing representative affirmed the April 13, 2011 decision. He found that the evidence was insufficient to factually establish that the incident occurred as alleged. The hearing representative further determined that the medical evidence did not show that appellant sustained a diagnosed condition due to the claimed work incident.

On appeal, appellant's attorney argues that the evidence establishes that the incident occurred at the time, place and in the manner alleged. He also contends that Dr. Bolno's medical reports are sufficient to show that appellant sustained an injury and that the case should be reversed.

LEGAL PRECEDENT

An employee seeking benefits under FECA[2] 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.[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 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.[5] 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.[6] 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.[7]

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

[2] 5 U.S.C. § 8101 *et seq.*

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

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

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

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

[7] *Id.*

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.[8] 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.[9] An employee has not met his or her burden of proof 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.[10] 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 a *prima facie* case has been established.[11] 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.[12]

Proceedings under FECA are not adversarial in nature and OWCP is not a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, it shares responsibility to see that justice is done.[13] The nonadversarial policy of proceedings under FECA is reflected in OWCP's regulations at section 10.121.[14]

ANALYSIS

Appellant alleged that he sustained an injury to his neck and shoulders on August 10, 2010 when he unloaded a container from a truck. He sought medical treatment on the date of the incident and filed a claim for compensation the next day.

The employing establishment controverted the claim. It contended that appellant had a preexisting condition and did not immediately report the injury. In an August 10, 2010 hospital report, a nurse related that he did not know when the pain began and that it was old. In an August 18, 2010 statement, Mr. Batipps maintained that on August 10, 2010 appellant looked like he was in pain but told him that he did not know what had happened.

On appeal, appellant's attorney argued that the evidence is sufficient to establish the occurrence of the August 10, 2010 employment incident. The Board finds that the evidence is sufficient to establish that appellant experienced the August 10, 2010 work incident at the time,

[8] *See Louise F. Garnett*, 47 ECAB 639 (1996).

[9] *See Betty J. Smith*, 54 ECAB 174 (2002).

[10] *See D.B.*, 58 ECAB 464 (2007); *id.*

[11] *Linda S. Christian*, 46 ECAB 598 (1995).

[12] *See V.F.*, 58 ECAB 321 (2007); *Gregory J. Reser*, 57 ECAB 277 (2005).

[13] *Jimmy A. Hammons*, 51 ECAB 219 (1999).

[14] 20 C.F.R. § 10.121.

place and manner alleged. 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 or persuasive evidence.[15] In this case, the record does not contain factual evidence sufficient to show that the claimed incident did not occur as alleged.[16] A coworker, Mr. Searles, related that he saw appellant "flinch" after moving a container. Appellant was taken to the hospital on the date of the alleged injury and told a physician at the hospital that he sustained pain running from his neck to his left arm after unloading a truck. He provided a generally consistent history of injury to his physicians. Appellant explained that he did not immediately report the injury to his supervisor because he thought that the pain would improve. He related that his supervisor did not directly ask him what had happened. Under the circumstances of this case, appellant's allegations have not been refuted by strong or persuasive evidence and there are no inconsistencies sufficient to cast serious doubt on his version of the employment incident.[17] Consequently, appellant has established the occurrence of the August 10, 2010 work incident.

The remaining issue is whether the medical evidence establishes that appellant sustained an injury causally related to the employment incident. The question of whether an employment incident caused an injury is generally established by medical evidence.[18]

On August 11, 2010 Dr. Bolno discussed appellant's history of neck pain radiating into his arms after moving containers of mail. On September 14, 2010 he indicated that he was treating appellant for an August 10, 2010 injury and diagnosed bilateral rotator cuff injuries and acute radiculopathy. Dr. Bolno opined that the diagnosed conditions were the "direct result of what happened on August 10, 2010…." In a February 3, 2011 report, he reviewed appellant's history of prior left shoulder and neck injuries and listed findings on examination of severe cervical spasm. Dr. Bolno found that an MRI scan study of the left shoulder showed a labral tear. He asserted that appellant's work on August 10, 2010 lifting and pushing a container of mail aggravated a preexisting cervical spine condition and caused "new cervical radiculopathy in his neck with an acute labral tear in his shoulders." Dr. Bolno attributed the numbness and left arm pain directly to his work activities on August 10, 2010 and found that he was totally disabled. His opinion is supportive, unequivocal, bolstered by objective findings and based on an accurate history of injury. Dr. Bolno's opinion lacks only an explanation of why the August 10, 2010 incident resulted in the diagnosed conditions. While the medical evidence from Dr. Bolno is insufficiently rationalized to meet appellant's burden of proof, it raises an undisputed inference of causal relationship sufficient to require further development by OWCP.[19] Accordingly, the Board will remand the case to OWCP. On remand, OWCP should further develop the medical record to determine whether appellant sustained an injury causally related to the August 10, 2010 work incident. Following this and such further development as OWCP deems necessary, it shall issue a *de novo* decision.

[15] *See Caroline Thomas*, 51 ECAB 451 (2000).

[16] *See Thelma Rogers*, 42 ECAB 866 (1991).

[17] *See M.H.*, 59 ECAB 461 (2008).

[18] *See John W. Montoya*, 54 ECAB 306 (2003).

[19] *Id*.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the April 13, 2011 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: March 20, 2012
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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