United States Department of Labor
Employees' Compensation Appeals Board

S.N., Appellant	)	
and	)	**Docket No. 12-1814**
	)	**Issued: March 11, 2013**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH ADMINISTRATION, Decatur, GA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 4, 2012 appellant filed a timely appeal from the August 1, 2012 Office of Workers' Compensation Programs' (OWCP) decision which found that he did not sustain an injury in the performance of duty. 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

The issue is whether appellant met his burden of proof to establish that he sustained a traumatic injury in the performance of duty on January 22, 2012.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 8, 2012 appellant, then a 30-year-old pharmacy technician, filed a traumatic injury claim alleging that on January 22, 2012 he sustained an injury to his right elbow, due to repetitive motion from bagging and packaging mail at work. A witness statement from Kevin O. Pearson, a coworker, explained that he was at work on January 22, 2012. While filling and lifting mail trays, he observed appellant injure his right arm. Sybil Taylor, a supervisor at the employing establishment, stated that her knowledge of the facts about the injury agreed with the statements of the employee and witness. Appellant did not stop work.

In an incident report of January 22, 2012, Ms. Taylor noted that appellant was bagging mail in the pharmacy during his shift and the muscles in his right forearm began to hurt. The pain prevented appellant from flexing his arm normally. Ms. Taylor stated that corrective action was taken to include more frequent rotation in his work assignment.

OWCP received a copy of appellant's employee health record from January 23, 2012. On January 22, 2012 appellant was at work when he felt pain in both of his elbows, with the pain in the right arm more severe.

A January 22, 2012 emergency room note from Dr. Robert B. Neuman, a Board-certified internist, diagnosed elbow arthritis "likely associated with repetitive movement." A January 23, 2012 treatment note from a physician's assistant advised that appellant needed to alternate mailing/packaging duties with other pharmacy duties on a daily basis if possible.

Appellant submitted treatment notes dated from February 2, 2012 from Dr. Michael B. Miller, Board-certified in family medicine. On February 16, 2012 Dr. Miller noted that appellant was seen for follow up. He found that appellant could return to work but advised that he limit the amount of repetitive work performed.

In a May 30, 2012 report, Dr. Howard B. Krone, a Board-certified orthopedic surgeon, noted that on January 22, 2012 appellant was packing mail prescriptions three days in a row when he noted the onset of significant pain over the lateral aspect of the right elbow. He examined appellant and opined that he had ulnar neuritis and mild secondary entrapment.

On June 18, 2012 appellant filed a Form CA-7 claim for compensation for five hours on May 30, 2012 and six hours on June 13, 2012.

By letter dated June 25, 2012, OWCP advised appellant that initially his injury appeared to be a minor one that resulted in minimal or no lost time from work. Because the employing establishment did not controvert continuation of pay or challenge the merits of the case, payment of a limited amount of medical expenses was administratively approved and the merits of the claim had not been formally considered. The claim was reopened for consideration because a claim for wage loss had been received. It informed appellant that the evidence of record was insufficient to support his disability. Appellant was advised of the medical and factual evidence needed and to respond within 30 days.

In a June 13, 2012 report, Dr. Krone noted that appellant's grip strength was normal and he had a negative Tinel's sign. He advised that appellant's symptoms of dysesthesias and

referred pain had cleared completely. Dr. Krone discharged appellant and stated that there was no permanent disability or limitation in his work status.

In a July 9, 2012 report, Dr. Miller noted that appellant's history of injury included that he developed right elbow pain as a result of repetitive, awkward pulling using his right arm over the course of a single work shift on January 22, 2012. Appellant reported his symptoms immediately and sought medical care. He continued to try to perform his job despite the fact that it was aggravated by the same repetitive motions on subsequent days until he was given alternate job duties. Dr. Miller diagnosed right lateral epicondylitis and right ulnar nerve neuritis. He advised that appellant was able to return to full duties on July 9, 2012 and reached maximum medical improvement.

In a July 3, 2012 statement, appellant explained that his injury was promptly reported to his supervisor on January 22, 2012. He did not sustain any other injury after that date. There was no new onset of pain in May 2012 but rather it was a continuation of the pain that he experienced since the original injury. Appellant continued to use anti-inflammatory medication for about two and a half months to reduce the swelling in the ulnar nerve.

By decision dated August 1, 2012, OWCP denied appellant's claim on the grounds that the evidence was not sufficient to establish that the work activities occurred as described. It found that appellant was not clear with regard to the period of time the repetitive motion activities lasted. OWCP noted that appellant stated that he was working to clear up a 10- to 14-day backlog and the witness noted that, while working, appellant injured his right arm. It noted that it appeared as though the injury resulted from a single lifting event. OWCP also noted that Dr. Krone noted a history of appellant was packing mail prescriptions three days in a row and, on January 22, 2012, he noted the onset of significant pain over the lateral epicondyle of the right elbow. Since appellant indicated that he was clearing up a 10- to 14-day backlog of mailing prescriptions, the description of three days of repetitive packing was the more logical explanation of injury, and made it one of an occupational disease claim. It remained unclear whether the onset of pain and injury resulted from a single lifting event, or from three days of packaging prescriptions as stated in Dr. Krone's report of May 30, 2012, or from a single day of repetitive work as stated in Dr. Miller's report of July 9, 2012. Due to discrepancies in the statements describing the history of injury and the gap in time in seeking medical treatment of more than three months; it was not clear whether the current symptoms or diagnosis for which appellant filed wage-loss claims were related by cause and effect to the claimed January 22, 2012 injury.

LEGAL PRECEDENT

An employee seeking benefits under FECA 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 and that an injury was sustained in the performance of duty.[2] These

[2] *Joe D. Cameron*, 41 ECAB 153 (1989); *James E. Chadden Sr.*, 40 ECAB 312 (1988).

are the essential elements of each compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[3]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the fact of injury has been established. There are two components involved in establishing the fact of injury. 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.[4] In some traumatic injury cases, this component can be established by an employee's uncontroverted statement on the Form CA-1.[5] 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.[6]

An alleged work incident 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 statement must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.[7] A consistent history of the injury as reported on medical reports to the claimant's supervisor and on the notice of injury can also be evidence of the occurrence of the incident.[8] 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 sufficient doubt on an employee's statements in determining whether a *prima facie* case has been established.[9] Although 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,[10] an employee has not met this burden when there are inconsistencies in the evidence such as to cast serious doubt upon the validity of the claim.[11]

[3] *Delores C. Ellyett*, 41 ECAB 992 (1990).

[4] *Julie B. Hawkins*, 38 ECAB 393, 396 (1987).

[5] *John J. Carlone*, 41 ECAB 354 (1989).

[6] *See John J. Carlone*, *id*.

[7] *Rex A. Lenk*, 35 ECAB 253, 255 (1983).

[8] *Id*. at 255-56.

[9] *Dorothy M. Kelsey*, 32 ECAB 998 (1981).

[10] *Id.*

[11] *Joseph A. Fournier*, 35 ECAB 1175 (1984).

Should a claimant submit an incorrect form, such as a notice of traumatic injury rather than a notice of occupational disease,[12] such a submission is a technical error. OWCP should inform the claimant and employing establishment whether the claim has been converted to a different type of injury than what was originally claimed and explain the reasons for the method of adjudication. If the actual benefits claimed by the claimant cannot be determined from review of the form, OWCP should develop the claim based upon the claim form filed and direct questions to the claimant to determine the type of benefits claimed. Based upon the response to the development letter, OWCP should make a determination as to whether the correct claim was established and, if not, OWCP should convert the claim to the proper type of claim and notify the claimant and employing establishment of the conversion.[13]

ANALYSIS

The Board finds that this case is not in posture for decision regarding whether appellant sustained an injury in the performance of duty.

Appellant filed a traumatic injury claim asserting that on January 22, 2012 he sustained an injury to his right elbow, tendons and muscle due to repetitive bagging and packaging mail which was 10 to 14 days backlogged. Ms. Taylor, the supervisor, agreed with the statements of the incident as did a coworker witness. OWCP found that appellant had not established fact of injury due to inconsistencies in the evidence that cast serious doubt as to whether the alleged traumatic incident occurred at the time, place and in the manner alleged, the Board disagrees. The Board notes that his statements are consistent and uncontroverted. OWCP referred to the reports of Dr. Krone who obtained a history of appellant packing mail prescriptions three days in a row; Dr. Miller, however, noted that appellant developed right elbow pain as a result of repetitive awkward pulling over the course of a single work shift on January 22, 2012. The matter of whether an injury arose because appellant was doing the same thing over multiple shifts does not change the fact that appellant was in the performance of duty as alleged on January 22, 2012. As noted, it is improper to deny a case on the basis that the claimant submitted an incorrect form, such as a notice of traumatic injury rather than a notice of occupational disease; as such a submission is a technical error. The evidence supports that appellant worked on January 22, 2012 and performed repetitive duties comprised of bagging and packaging mail which was backlogged. The Board finds that appellant has established the incident as alleged. OWCP must address the medical evidence.

Proceedings under FECA are not adversarial in nature nor is OWCP a disinterested arbiter. While appellant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence. It has the obligation to see that justice is

[12] 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). These regulations define an occupational disease or illness as a condition produced by the work environment over a period longer than a single workday or shift. 20 C.F.R. § 10.5(q).

[13] Federal FECA Procedure Manual, Part 2 -- Claims, *Development of Claims*, Chapter 2.800.3(c)(2) (June 2011).

done.[14] Consequently, the Board will remand the case for OWCP to consider the medical component of fact of injury and adjudicate whether appellant sustained an injury due to the January 22, 2012 incident and, if so, the extent of any condition and disability. After such development as is deemed necessary, it should issue a *de novo* decision.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the August 1, 2012 decision of the Office of Workers' Compensation Programs is set aside and remanded.

Issued: March 11, 2013
Washington, DC

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

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

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

[14] *John W. Butler*, 39 ECAB 852 (1988).