United States Department of Labor
Employees' Compensation Appeals Board

B.T., Appellant	)	
and	)	**Docket No. 13-138**
	)	**Issued: March 20, 2013**
DEPARTMENT OF VETERANS AFFAIRS, ALBANY STRATTON VETERANS ADMINISTRATION MEDICAL CENTER, Albany, NY, 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
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 25, 2012 appellant filed a timely appeal of an October 11, 2012 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 the case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained a traumatic injury while in the performance of duty on August 15, 2012.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 30, 2012 appellant, then a 64-year-old housekeeping aide, filed a traumatic injury claim alleging that he moved a bag of contaminated waste from a receptacle to a trash cart on August 15, 2012. He experienced back pain. Appellant stopped work on August 22, 2012 and returned on September 17, 2012. George R. Thomas, a supervisor, controverted appellant's claim on the grounds that he was persuaded by a third party to attribute the back injury to his federal employment.

An August 23, 2012 note from Dr. John M. Bashant, an osteopath and Board-certified internist, diagnosed lumbar strain.

In an August 30, 2012 report, Dr. Luke V. Rigolosi, a Board-certified physiatrist, related that appellant was "doing various activities" at work on August 15, 2012, "including lifting objects." The following day, appellant was unable to move. On examination, Dr. Rigolosi observed limited lumbar range of motion as well as lumbar spasms and tenderness to palpation. X-rays exhibited decreased L5-S1 disc height and widespread degenerative changes. Dr. Rigolosi diagnosed lumbar sprain/strain due to appellant's activities on August 15, 2012 and underlying degenerative disc disease. He commented that "the incident that the patient described" was "a competent medical cause of injury." Dr. Rigolosi placed appellant off duty for the period August 17 to September 17, 2012.

OWCP informed appellant in a September 10, 2012 letter that additional evidence was needed to establish his claim. It gave him 30 days to submit a factual statement detailing the work incident that occurred on August 15, 2012 and a report from a qualified physician explaining how the incident caused or contributed to a diagnosed injury.

In a September 13, 2012 report, Dr. Rigolosi noted that appellant's symptoms improved significantly. He opined that appellant remained partially disabled and would be released to regular duty on September 17, 2012.[2]

By decision dated October 11, 2012, OWCP denied appellant's claim, finding the evidence insufficient to establish that an employment incident occurred on August 15, 2012 as alleged.

LEGAL PRECEDENT

An employee seeking compensation under FECA has the burden of establishing the essential elements of his or her claim by the weight of reliable, probative and substantial evidence,[3] including that he or she is an "employee" within the meaning of FECA and that he or she filed his or her claim within the applicable time limitation.[4] The employee must also

[2] Dr. Rigolosi restated the findings and diagnoses contained in his earlier report.

[3] *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 57 (1968).

[4] *R.C.*, 59 ECAB 427 (2008).

establish that he or she sustained an injury in the performance of duty as alleged and that his or her disability for work, if any, was causally related to the employment injury.[5]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established. There are two components involved in establishing 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. Second, the employee must submit medical evidence to establish that the employment incident caused a personal injury.[6]

An employee's statement 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.[7] Moreover, an injury does not have to be confirmed by eyewitnesses. The employee's statement, however, must be consistent with the surrounding facts and circumstances and his or her subsequent course of action. An employee has not met his or her burden 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. Circumstances such 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 statement in determining whether a *prima facie* case has been established.[8]

Rationalized medical opinion evidence is generally required to establish causal relationship. The opinion of the physician must be based on a complete factual and medical background, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[9]

ANALYSIS

The Board finds that appellant established that he moved a bag of contaminated waste from a receptacle to a trash cart on August 15, 2012. Appellant's account paralleled the history of injury obtained by Dr. Rigolosi.[10] Furthermore, he refrained from work for the period August 22 to September 17, 2012, received medical treatment, notified the employing establishment and timely filed a traumatic injury claim. 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. While Mr. Thomas argued that a third

[5] *Id.*; *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[6] *T.H.*, 59 ECAB 388 (2008).

[7] *R.T.*, Docket No. 08-408 (issued December 16, 2008); *Gregory J. Reser*, 57 ECAB 277 (2005).

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

[9] *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[10] *See Caroline Thomas*, 51 ECAB 451 (a consistent history of the injury as reported on medical reports, to the claimant's supervisor and on the notice of injury can be evidence of the occurrence of the incident).

party had convinced appellant to file a workers' compensation claim, this contention was not substantiated by any strong or persuasive evidence. In view of the totality of the evidence, the Board finds that an employment incident occurred on August 15, 2012.

The Board finds, however, that the medical evidence is not sufficient to establish that the accepted August 15, 2012 employment incident caused or contributed to a lower back condition. In an August 30, 2012 report, Dr. Rigolosi remarked that appellant lifted various objects at work on August 15, 2012 and was unable to move the following day. Based on x-ray and physical examination findings, he diagnosed work-related lumbar sprain/strain and underlying degenerative disc disease. Dr. Rigolosi briefly noted that "the incident that [appellant] described" was "a competent medical cause of injury." He reiterated his findings in a September 13, 2012 report. Dr. Rigolosi merely communicated appellant's belief on the issue of causal relationship.[11] He did not provide a full medical history of appellant's treatment for any prior condition. Dr. Rigolosi did not pathophysiologically explain how moving a bag of contaminated waste on August 15, 2012 caused or contributed to lumbar injury.[12] The need for rationalized medical opinion evidence is important because Dr. Rigolosi also diagnosed preexisting degenerative disc disease.

The August 23, 2012 note from Dr. Bashant was of diminished probative value because the osteopath did not discuss whether appellant's diagnosed lumbar strain resulted from his federal employment.[13] In the absence of rationalized medical opinion evidence, appellant failed to discharge his burden of proof.

Appellant submitted new evidence on appeal and after issuance of the October 11, 2012 decision. The Board, however, lacks jurisdiction to review evidence for the first time on appeal.[14]

Appellant may submit new evidence or argument as part of a formal 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 did not establish that he sustained a traumatic injury while in the performance of duty on August 15, 2012.

[11] *See P.K.*, Docket No. 08-2551 (issued June 2, 2009) (an award of compensation may not be based on a claimant's belief of causal relationship).

[12] *Joan R. Donovan*, 54 ECAB 615, 621 (2003); *Ern Reynolds*, 45 ECAB 690, 696 (1994). *See also John W. Montoya*, 54 ECAB 306, 309 (2003) (a physician's opinion must discuss whether the employment incident described by the claimant caused or contributed to a diagnosed medical condition).

[13] *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *S.E.*, Docket No. 08-2214 (issued May 6, 2009).

[14] 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the October 11, 2012 decision of the Office of Workers' Compensation Programs is affirmed as modified.

Issued: March 20, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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