United States Department of Labor
Employees' Compensation Appeals Board

R.S., Appellant	)	
and	)	**Docket No. 13-1072**
	)	**Issued: September 19, 2013**
U.S. POSTAL SERVICE, POST OFFICE, Auburn, ME, 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 April 3, 2013 appellant filed a timely appeal from a January 8, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to 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 established an injury in the performance of duty on April 29, 2010.

FACTUAL HISTORY

On August 26, 2012 appellant, then a 59-year-old mail clerk/expediter, filed an occupational disease (Form CA-2) alleging a hernia causally related to his employment on April 29, 2010.On the form, he stated that he had actually filed a Form CA-1within 30 days after the incident, but the employing establishment failed to record it.

In support of his claim, appellant submitted a Family Medical Leave Act (FMLA) Certification,fromDr. Justin Clark, a Board-certified surgeon, who noted that appellant had an

umbilical hernia and was scheduled for surgery on September 10, 2012. Dr. Clark stated that appellantwould be unable to work for two weeks after surgery. He marked the date that the condition commenced as "unknown."On September 18, 2012 appellant provided an absence from work note for September 18 toOctober 2, 2012, signed by Dr. Clark and dated July 3, 2012. On September 27, 2012 he provided treatment notes from a June 6, 2012 visit to Dr. Clark, who diagnosed a hernia based upon physical examination.

By letter dated December 5, 2012, OWCP requested additional information from the employing establishment regarding the tasks assigned to appellant requiring physical exertion, precautions to minimize effects of the activities and a description of his position with physical requirements.In another letter dated December 5, 2012, it requested additional information from appellant regarding the factual component of fact of injury. OWCP advised him that the evidence was not sufficient to establish that he actually experienced the employment factors alleged to have caused injury. It requested additional information regarding the medical component of fact of injury, stating that the evidence did not substantiate that the diagnosis of umbilical hernia was caused or aggravated by the work injury.

On December 21, 2012 the employing establishment responded that the alleged incident was never brought forward by the last officer in charge and that appellant never mentioned anything about the incident, so no accommodations were made to minimize the effects of his activities.However, the employing establishment did confirm that pushing, pulling, squatting and bending were all within appellant's duties as an expediter and that he "moves every type of postal equipment from aircraft containers down to the smallest hampers."

Appellant responded to the questionnaire on December 30, 2012, replying that he did not state that he had a stomach pull two months after the physical examination, but had reported the injury on the same day completing a Form CA-1, which was not filed by the employing establishment.He described his injury as occurring when he was lifting a double stacked hamper to the upright position. Appellant noticed a bump stick out from his stomach about a month afterward. The bump did not begin to grow until three months after he became aware of it. During his annual physical, Dr. Seth Gordon, a Board-certified internist,told appellant that the risks of surgery outweighed the actual injury, and that appellant should contact him if the bump began to hurt or enlarge. Appellant attached a copy of the April 29, 2010 Form CA-1, to his response. It described the incident as follows: "While stacking hampers and tipping them up, the bottom slid out and I lunged forward to keep lifting."Appellant described the injury as "stomach pain -- felt like pulled muscle."

By decision dated January 8, 2013, OWCP denied the claim for compensation.It found the factual evidence was insufficient to establish that the April 29, 2010 incident occurred as alleged. The medical evidence was also found insufficient to establish causal relation.

LEGAL PRECEDENT

FECA provides for payment of compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.[1] The phrase

[1] 5 U.S.C. § 8102(a).

"sustained while in the performance of duty" in FECA is regarded as the equivalent of the commonly found requisite in workers' compensation law of "arising out of and in the course of employment."[2] An employee seeking benefits under FECA has the burden of establishing that he or she sustained an injury while in the performance of duty.[3] A traumatic injury is defined 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.[4]

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 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 that is alleged to have occurred.The employee has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence. 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, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.[5] It is well established that a claimant cannot establish fact of injury if there are inconsistencies, 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, which may, if otherwise unexplained, cast sufficient doubt on an employee's statements in determining whether a *prima facie* case has been established.[6] 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 or persuasive evidence.[7]

The second component is whether the employment incident caused a personal injury and generally this can be established only by medical evidence.[8] Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on the issue of whether there is a causal relationship between a diagnosed condition and the identified employment factor. The opinion of the physician must be based on a complete factual and medical background, must be of reasonable medical certainty and supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. The weight of medical evidence is determined by

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[2] *Valerie C. Boward*, 50 ECAB 126 (1998).

[3] *Melina C. Epperly*, 45 ECAB 196, 198 (1993); *see also* 20 C.F.R. § 10.115.

[4] 20 C.F.R.§10.5(ee).

[5] *S.M.*, Docket No. 13-1140 (issued July 23, 2013); *D.B.*, 58 ECAB 464, 466-67 (2007).

[6] *Robert A. Gregory*, 40 ECAB 478, 483 (1989).

[7] *Id.*

[8] *See John J. Carlone*, 41 ECAB 354, 357 (1989).

its reliability, its probative value, its convincing quality, the care of the analysis manifested and the medical rationale expressed in support of the physician's opinion.[9]

ANALYSIS

Appellant claimed that he sustained a hernia on April 29, 2010 after lifting hampers of mail. OWCP denied the claim on the basis of insufficient factual and medical evidence. The Board finds that the evidence of record is sufficient to establish that the April 29, 2010 incident occurred as alleged, but the medical evidence of record is insufficient to establish that appellant sustained an injury as a result of the incident.

The employing establishment responded to a request for information from OWCP on December 21, 2012, stating that the alleged incident was never documented by the last officer in charge. Further, appellant never mentioned anything about the incident, so no accommodations were made to minimize the effects of his activities. However, the employing establishment did confirm that pushing, pulling, squatting and bending were all within appellant's duties as an expediter, and that he "moves every type of postal equipment from aircraft containers down to the smallest hampers."

Appellant responded to OWCP's request for information on December 30, 2012, stating that he reported the injury on the day of injury by filling out a Form CA-1, but that itwas not filed by the employing establishment. He described his injury as occurring when he was lifting a double stacked hamper to the upright position. Appellant attached a copy of the Form CA-1, dated April 29, 2010, which described the incident as follows: "While stacking hampers and tipping them up, the bottom slid out and I lunged forward to keep lifting."He described the injury as "stomach pain -- felt like pulled muscle."

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, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.[10] It is well established that a claimant cannot establish fact of injury if there are inconsistencies, 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, which may, if otherwise unexplained, cast sufficient doubt on an employee's statements in determining whether a *prima facie* case has been established.[11] 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 or persuasive evidence.[12]

The Board finds thatappellant's statement, hisinitial Form CA-1 and the employing establishment's description of his duties as a mail clerk/expediter, are sufficient to establish that

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[9] *D.T.*, Docket No. 10-1358 (issued February 7, 2011); *Jennifer Atkerson*, 55 ECAB 317, 319 (2004).

[10] *S.M.*, Docket No. 13-1140 (issued July 23, 2013); *D.B.*, 58 ECAB 464, 466-67 (2007).

[11] *Robert A. Gregory*, 40 ECAB 478, 483 (1989).

[12] *Id.*

the April 29, 2010 incident occurred as alleged.There is no evidence in the record inconsistent with appellant's statements. The only evidence of record apart from his own statements, that of the employing establishment confirming that his job duties include pushing, pulling, squatting and bending. The employing establishment does not refute that appellant was lifting mail hampers on April 29, 2010 as described.

The fact that the employing establishment failed to file the Form CA-1 does not create an inconsistency such as late notification of injury or late confirmation of injury. Appellant continued to work without apparent difficulty following the injury, but this activity not in and of itself inconsistent with a finding that the incident occurred as 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. The evidence on appeal does not establish inconsistencies in appellant's statement of events. Appellant has submitted sufficient evidence to establish that the April 29, 2010 incident occurred as alleged.

The medical evidence of record, however, is not sufficient to establish that the diagnosed medical condition is causally related to the incident. Appellantsubmitted anFMLA Certification in which Dr. Clark noted that appellant had an umbilical hernia and scheduled for surgery on September 10, 2012. Dr. Clark stated that appellant would be unable to work for two weeks after surgery. He marked the date the condition commenced as "unknown."Appellant also included an FMLA designation notice for leave dated August 21, 2012. On September 18, 2012 he provided an absence from work note dated September 18 to October 2, 2012, signed by Dr. Clark and dated July 3, 2012.On September 27, 2012appellant provided treatment notes from a June 6, 2012 visit to Dr. Clark, who diagnosed a hernia from a physical examination of appellant, but did not opine as to its cause.

As noted, to establish causal relationship a claimant must submit medical evidence from a physician, based on a complete and accurate factual and medical history; one of reasonable medical certainty;and supported by rationale explaining the nature of the relationship between the diagnosed condition and incident of employment.[13]

None of the medical evidence submitted by appellant provides a rationalized medical opinion addressing causal relation or medical rationale explaining the nature of the relationship between the diagnosed hernia and the April 29, 2010 lifting incident identified by him. Instead, Dr. Clark's treatment notes, FMLA-related documents and absence from work note diagnosed an umbilical hernia and listed the course of treatment. He did not address the cause of the hernia, nor mention that the injury was work related.Because the evidence of record does not contain a rationalized medical opinion supporting causal relationship, it is not sufficient to establish that the diagnosed hernia is causally related to the accepted incident.

Appellant submitted new evidence on appeal. The Board lacks jurisdiction to review evidence for the first time on appeal.[14] Appellant may submit new evidence or argument with a

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[13]*See*, *e.g.*,*Donald W. Wenzel*, 56 ECAB 390 (2005); *Roy L. Humphrey*, 57 ECAB 238 (2005).

[14]20 C.F.R. § 501.2(c).

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 an injury causally related to an April 29, 2010 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the January 8, 2013 decision of the Office of Workers' Compensation Programs is affirmed, as modified.

Issued: September 19, 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