

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

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N.U., Appellant )

and )

U.S. POSTAL SERVICE, NEW YORK )  
PERFORMANCE CLUSTER, New York, NY, )  
Employer )

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**Docket No. 14-94  
Issued: April 18, 2014**

*Appearances:*  
Thomas S. Harkins, 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  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On October 22, 2013 appellant, through his attorney, filed a timely appeal from the August 12, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (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 medical condition in the performance of duty.

**FACTUAL HISTORY**

On October 12, 2011 appellant, then a 51-year-old city carrier, filed a claim for recurrence of disability (Form CA-2a) alleging that he sustained a recurrence of disability on

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

October 8, 2011 due to a January 28, 2011 work injury. Appellant stated that he experienced pain due to casing mail and moving his arms, head and shoulders to the left and right and up and down. He stated that he sat and stood for extended periods and experienced pain which extended from the back of his head to his back. Appellant stopped work on October 8, 2011.<sup>2</sup> He submitted medical evidence, including a disability slip from an attending physician.

On December 27, 2011 OWCP advised appellant that his case would be converted into a traumatic injury as the description provided by him on the Form CA-2a constituted a new injury. It requested that he submit additional factual and medical evidence. Appellant submitted medical evidence, including a work restriction form of an attending physician.

In a January 27, 2012 decision, OWCP denied appellant's claim that he sustained a medical condition in the performance of duty. Regarding the reason for the denial, it stated that appellant had not established the factual component of his claim. OWCP stated, "Specifically your case is denied because the evidence is not sufficient to establish that the event(s) occurred as you described. The reason for this finding is that you did not submit a statement describing in detail how your injury occurred. It is unclear what workplace incident caused your claimed condition."

Appellant submitted a February 20, 2012 statement, received on March 2, 2012, in which he stated that he returned to limited-duty work in September 2011. He noted that, due to the damaged disc in his lower back, the sitting and standing required by this job was causing the disc in his back to rub against the spine. Reaching up and down to sort and case mail made his neck hurt and sent sharp pains to his head. He stated that his medical treatment was still ongoing with surgery scheduled in the next month or so. Appellant submitted additional medical evidence including a January 16, 2012 report of Dr. Sebastian Lattuga, an attending Board-certified orthopedic surgeon.

In a May 31, 2012 decision, OWCP affirmed its May 31, 2012 decision noting, "Your statement does not support that you suffered a head, back or neck condition due to a specific work incident on October 8, 2011.... While you did provide a new statement, you still have not described a specific work incident on October 8, 2011. Nor does the medical evidence of file diagnose a condition in connection with the claimed incident. As such, it cannot be established that an incident occurred at the time, place and in the manner alleged."

In a December 6, 2012 statement, appellant indicated that his job required him to sort and case the mail before delivery. These tasks required him to stand, sit, reach up, bend down, reach up from side to side and look up and down constantly. Because of the damaged disc in appellant's lower back and neck, performing these activities caused the discs in his back and neck to rub against the spinal cord. Appellant stated that reaching up and down to sort and case the mail was making his neck hurt and sending sharp pains to his head. He noted that on October 8, 2011 he decided that he could not continue to perform such work and his attending

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<sup>2</sup> At the time of his work stoppage, appellant was working four hours per day in a limited-duty job after he sustained back, neck and extremity injuries at work on January 28, 2011 when snow fell on him and knocked him to the ground.

physician indicated that he should stop work. Appellant submitted medical evidence in support of his claim, including an April 30, 2013 report of Dr. Lattuga.

In an August 12, 2013 decision, OWCP affirmed its May 31, 2012 decision denying appellant's claim for a work-related injury. Regarding the reasons for the denial, it provided Board precedent stating that an employee has not met his burden of proof to establish a work-related condition where there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim. OWCP stated, "The evidence is not sufficient to modify the decision dated May 31, 2012 because your statement of December 6, 2012 differs from the original statement surrounding the circumstances of your claim dated February 20, 2012 therefore there is doubt surrounding the circumstances surrounding your claim."

### **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, 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.<sup>3</sup> These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>4</sup>

With respect to the requirement of establishing the occurrence of an injury at the time, place, and in the manner alleged, it is noted that 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.<sup>5</sup> An employee has not met his or her burden of proof to establish the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.<sup>6</sup> 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.<sup>7</sup> However, an employee's statement alleging

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<sup>3</sup> *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

<sup>4</sup> *Delores C. Ellyett*, 41 ECAB 992, 998-99 (1990); *Ruthie M. Evans*, 41 ECAB 416, 423-27 (1990). A traumatic injury refers to injury caused by a specific event or incident or series of incidents occurring within a single workday or work shift whereas an occupational disease refers to an injury produced by employment factors which occur or are present over a period longer than a single workday or work shift. 20 C.F.R. § 10.5(q), (ee); *Brady L. Fowler*, 44 ECAB 343, 351 (1992).

<sup>5</sup> *Charles B. Ward*, 38 ECAB 667, 670-71 (1987); *Joseph Albert Fournier, Jr.*, 35 ECAB 1175, 1179 (1984).

<sup>6</sup> *Tia L. Love*, 40 ECAB 586, 590 (1989); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

<sup>7</sup> *Samuel J. Chiarella*, 38 ECAB 363, 366 (1987); *Henry W.B. Stanford*, 36 ECAB 160, 165 (1984).

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.<sup>8</sup>

OWCP procedures provide that a case which is created may nonetheless lack appropriate forms. Submission of an incorrect form is a technical error and it is improper to deny a case on the basis that the claimant failed to submit the correct form.<sup>9</sup>

### ANALYSIS

The Board finds that the case is not in posture for decision regarding whether appellant sustained a medical condition in the performance of duty.

The Board finds that OWCP improperly denied appellant's claim on the grounds that he did not establish the factual component of his claim for a work-related condition. OWCP suggested that there were such inconsistencies in his claim as to cast doubt on the validity of his claim. It indicated that appellant initially claimed an October 8, 2011 traumatic injury but later changed his claim to an occupational disease claim.

Although appellant initially filed his claim on an inappropriate claim form (recurrence of disability claim form), this cannot serve as the basis for the denial of his claim.<sup>10</sup> Contrary to OWCP's assertions, he consistently submitted statements in which he claimed that he sustained an occupational disease due to the duties he performed over an extended period after returning to limited-duty work in September 2011. Appellant described the duties of his job which required sorting and casing mail. He noted that he was required to move his head, shoulders, arm and back and that these movements caused injury to these body parts. Appellant also indicated that the extended sitting and standing required by his job caused injury to his back.

The Board finds that appellant established the above-described work factors in connection with a claim for a work-related occupational disease. As OWCP denied appellant's claim on a factual basis, it failed to adequately evaluate the medical evidence in light of these established work factors. Therefore, the case shall be remanded to OWCP to properly consider the medical evidence. After such development as it deems necessary, OWCP shall issue an appropriate decision regarding whether appellant submitted sufficient medical evidence to establish that a medical condition was sustained due to the accepted work factors.

### CONCLUSION

The Board finds that the case is not in posture for decision regarding whether appellant sustained a medical condition in the performance of duty. The case is remanded to OWCP for additional development.

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<sup>8</sup> *Robert A. Gregory*, 40 ECAB 478, 483 (1989); *Thelma S. Buffington*, 34 ECAB 104, 109 (1982).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Development of Claims*, 2.800.3(c)(2) (June 2011).

<sup>10</sup> *See supra* note 9.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 12, 2013 decision of the Office of Workers' Compensation Programs is set aside and the case remanded to OWCP for further proceedings consistent with this decision of the Board.

Issued: April 18, 2014  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board