United States Department of Labor
Employees' Compensation Appeals Board

L.S., Appellant	)	
	)	
and	)	**Docket No. 13-1742**
	)	**Issued: August 7, 2014**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS AFFAIRS MEDICAL CENTER, Northport, NY, Employer	)	

Appearances:
Paul Kalker, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Acting Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 15, 2013 appellant, through his attorney, filed a timely appeal from a March 20, 2013 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 this case.

ISSUE

The issue is whether appellant sustained an injury on August 11, 2011 in the performance of duty.

FACTUAL HISTORY

On August 12, 2011 appellant, then a 26-year-old housekeeping aid, filed a traumatic injury claim alleging that on August 11, 2011 he sustained an injury to his back and head when

[1] 5 U.S.C. § 8101 *et seq.*

he slipped and fell. He stopped work on that same day. The employing establishment controverted the claim, noting that a witness statement differed from appellant's account of the injury.

The employing establishment related that appellant described the injury as occurring when he was pushing a trash container to the loading dock. Appellant "reached in the trash container to remove the trash bag and stepped on [the] ramp to compactor when he slipped forward hitting his head on gate/rail to compactor and fell down."

The employing establishment indicated that appellant used leave from work beginning around June 6, 2011 due to a nonemployment-related condition. Appellant returned to work on August 11, 2011 when he ran out of leave. The employing establishment maintained that his version of the incident differed from an eyewitness statement.

In an e-mail statement dated August 11, 2011, John Salamone, a coworker, related that on August 11, 2011 he saw a worker "throwing garbage into the dumpster. I noticed him lift a bag of garbage out of a bin, turn and throw it into the dumpster, at which time he grimaced in pain and fell to the floor. I immediately provided assistance, called for help to one of the paint shop employees and called the emergency number to get medical attention."

In an emergency room report dated August 12, 2011, Dr. Clark Homan, Board-certified in emergency medicine, discussed appellant's history of falling at work on August 11, 2011 striking his back on a rail and hitting his head. A computerized tomography scan of the head and x-rays of the thoracic and lumbosacral spine obtained at the employing establishment's clinic on August 11, 2011 were negative. Dr. Homan diagnosed a head contusion and lumbar strain. He found that appellant could resume work with restrictions in four days.

In a report dated August 23, 2011, Dr. Shahid Mian, a Board-certified orthopedic surgeon, related that appellant sustained injury to his neck and low back at work on August 11, 2011 when he fell on a greasy ramp "pushing a cart full of garbage bags on a ramp."[2] He diagnosed cervical strain and low back syndrome and found that appellant was totally disabled.

By decision dated September 27, 2011, OWCP denied appellant's claim after finding that he had not factually established the occurrence of the August 11, 2011 work incident. It further determined that he did not submit medical evidence establishing a diagnosed condition as a result of the alleged employment incident.

On October 12, 2011 appellant requested reconsideration.[3] In a statement dated October 11, 2011, he related that on August 11, 2011 he was preparing to put trash in a compactor on a loading dock accessed by walking up a ramp. Appellant maintained that the ramp was often slippery with oil from the garbage bags. He asserted that he slipped on the ramp

[2] Dr. Mian also indicated that appellant's chief complaint was a neck and low back injury from a motor vehicle accident at work; however, this appears to be a transcription error.

[3] On September 29, 2011 Dr. Mian diagnosed a displacement of a lumbar herniation and a torn medial meniscus and found that appellant was disabled from work beginning August 12, 2011.

and that "it happened so unexpectedly that I fell forward into the compactor gate, that is about two ft from the ramp. On the way down I hit my head and my lower back against the compactor gate." Mr. Salamone witnessed appellant's injury and called an ambulance.[4]

By decision dated January 9, 2012, OWCP denied modification of its September 27, 2011 decision. It found that appellant had not factually established the occurrence of the incident on August 11, 2011 as his statement describing his injury differed substantially from the statement of the witness, Mr. Salamone.

In a report dated June 22, 2012, Dr. Mian indicated that appellant sustained an injury on August 11, 2011 "at work pushing a cart full of garbage bags on a ramp.[5] [Appellant] slipped on greasy material on the ramp and he fell." Dr. Mian noted that appellant was taken to the emergency room on that date for x-rays. He diagnosed a disc herniation at L5-S1, bulging discs at L3-4 and L4-5 and cervical strain. Dr. Mian attributed the diagnosed conditions to the August 11, 2011 work injury and found that appellant was totally disabled.

On August 31, 2012 appellant, through his attorney, requested reconsideration. He argued that OWCP erred in failing to accept fact of injury based on Board case law holding that an employee's version of events stands unless refuted by strong evidence. Counsel also noted that OWCP did not request clarification from appellant or the witness as required by its procedure manual. He asserted that Mr. Salamone's statement is "largely supportive of and identical to, the claimant's account of the accident." Counsel stated, "Mr. Salamone confirmed that the claimant attempted to throw trash in the dumpster (compactor) and fell in the process of attempting to do so. It was Mr. Salamone that called the emergency number for medical assistance, thus confirming the severity of the claimant's condition." Counsel further alleged that the medical evidence establishes that appellant was disabled due to a work injury on August 11, 2011.

On November 1, 2012 the employing establishment indicated that appellant was treated at the hospital a month before his alleged work injury for postconcussion symptoms and asserted that his back, cervical and head conditions may be preexisting. It noted that he was removed from employment after he failed to respond to contact attempts by the employing establishment.

By decision dated March 20, 2013, OWCP denied modification of its January 9, 2012 decision. It determined that as appellant had not established the occurrence of the claimed work event, it did not need to consider the medical evidence.

On appeal, counsel argues that OWCP should have accepted appellant's version of the events on August 11, 2011 in accordance with Board precedent as unrebutted by strong and persuasive evidence. He argues that the statement of Mr. Salamone generally supports appellant's version of events and that OWCP has adopted an adversarial stance in accepting

[4] Appellant submitted a similar statement dated November 5, 2011.

[5] In a March 16, 2012 report, Dr. Naheed Van Da Walle, a physiatrist, provided both a history of appellant being injured at work in a motor vehicle accident on August 11, 2011 and being transported by ambulance to the hospital and of him slipping on a ramp at work.

Mr. Salamone's statement. Counsel also maintains that OWCP should at a minimum have required clarification from appellant and the witness. He further asserts that the medical evidence establishes employment-related disability as a result of the August 11, 2011 employment incident.

LEGAL PRECEDENT

An employee seeking benefits under FECA[6] 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.[7] 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.[8]

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.[9] 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.[10] 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.[11]

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 which is alleged to have occurred.[12] 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.[13] An employee

[6] *Supra* note 1.

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

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

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

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

[11] *Id.*

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

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

has not met his or her burden of proof of 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.[14] 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.[15] 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.[16]

ANALYSIS

OWCP denied appellant's claim based on its finding that he had not established the occurrence of the August 11, 2011 work injury. Appellant alleged that he injured his back and head when he fell on a slippery ramp while preparing to put trash in a compactor. He asserted that he hit his head and low back on the compactor gate. A coworker, Mr. Salamone, saw the incident and called an ambulance.

The employing establishment controverted the claim based on a witness statement from Mr. Salamone. In an e-mail dated August 11, 2011, Mr. Salamone indicated that he saw an employee turn to throw a bag of garbage into a dumpster, twist his face in pain and fall to the ground. He called for medical assistance. The employing establishment argued that there were discrepancies between appellant's version of the incident and Mr. Salamone's account sufficient to show that the incident did not occur as alleged.

The Board finds that the evidence is sufficient to establish that appellant experienced the August 11, 2011 work incident at the time, place and in the manner alleged. Appellant stopped work immediately after the incident and sought medical treatment. He provided a generally consistent history of injury to his physicians, the employing establishment and OWCP. 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 and persuasive evidence.[17] Not only is there no strong evidence contradicting appellant's statement regarding how the incident occurred, there is considerable evidence supporting his statement. The employing establishment does not dispute that he fell while attempting to put trash in a compactor. Mr. Salamone related that appellant grimaced and fell after turning to throw a bag into a dumpster, although he does not corroborate that he hit his head or back on the compactor. Under the circumstances of this case, the Board finds that his allegations have not been refuted by strong or persuasive evidence and that there are no inconsistencies sufficient to cast serious doubt on his version of the

[14] *Id*.

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

[16] *Gregory J. Reser*, 57 ECAB 277 (2005).

[17] *See Allen C. Hundley*, 53 ECAB 551 (2002).

employment incident.[18] Consequently, appellant has established the occurrence of the August 11, 2011 work incident.

As OWCP denied appellant's claim on the grounds that he did not establish the occurrence of an employment incident on August 11, 2011, it did not consider the medical evidence.[19] The case will be remanded to OWCP for evaluation of the medical evidence to determine whether he sustained a medical condition and/or disability due to the accepted August 11, 2011 work incident. After such further development as it deems necessary, it should issue a *de novo* decision.

CONCLUSION

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

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

[19] As previously noted, in reports dated August 23, 2011 and March 16, 2012, Dr. Mian and Dr. Da Walle noted a history of a motor vehicle accident. On remand, OWCP should clarify whether appellant sustained a motor vehicle accident and, if so, the date of the accident.

ORDER

IT IS HEREBY ORDERED THAT the March 20, 2013 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: August 7, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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