

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

L.G., Appellant)	
and)	Docket No. 15-0125
U.S. POSTAL SERVICE, POST OFFICE, White Plains, NY, Employer)	Issued: August 7, 2015
)	

Aparances:

*Appellant, pro se,
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 22, 2014 appellant filed a timely appeal from a June 23, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 her burden of proof to establish a traumatic injury in the performance of duty on June 2, 2013.

FACTUAL HISTORY

On June 3, 2013 appellant, then a 52-year-old mail handler, filed a traumatic injury claim alleging that at 6:00 p.m. on June 2, 2013 she reinjured her left arm while unloading a machine.²

¹ 5 U.S.C. § 8101 *et seq.*

² The record reflects that appellant had prior rotator cuff surgery on the same shoulder under claim number xxxxxx341. This other claim is not presently before the Board.

She stopped work on June 3, 2013. The employing establishment controverted the claim. It checked a box “yes” that appellant was in the performance of duty, but noted “according to her statement, no specific time.” The employing establishment advised that she had rotator cuff surgery on the same shoulder and could not pinpoint the time or a specific incident.

In a June 3, 2013 statement, appellant indicated that on June 2, 2013 she was working on “SPBS (one) and was dumping, loading and pushing hampers.” She indicated that she was using a staff to remove the mail from the pallet and felt okay at 6:00 p.m. Appellant explained that she was informed to report to the “AI” at 8:45 p.m. and she felt pain and discomfort in her left shoulder as she was prepping mail. She indicated that she immediately reported this to her supervisor and was told to sit down for a minute to see if she might feel better. However, the pain remained and appellant did not feel better, so she asked if she could go home. She explained that she still had pain the next day and was going to see a physician.

In a June 7, 2013 statement, Dolores Nesmith, a health and resource management specialist, noted that appellant returned to full duty with no restrictions on August 27, 2012 after OWCP proposed to terminate her benefits under Claim No. xxxxxx341. She indicated that such benefits were terminated on September 27, 2012, and now appellant claimed another injury to the left shoulder. Ms. Nesmith noted that appellant’s statement was in conflict with that of her supervisor, who indicated that appellant never informed her of a June 2, 2013 injury, but instead indicated that she wanted to go home because “she wasn’t feeling well” as her arm and shoulder would hurt in bad or rainy weather. She stated that another employee, Stephanie St. Clair, submitted a statement explaining that, when she asked appellant what was wrong with her, appellant grabbed her left shoulder and responded, “I had surgery and every now and then my shoulder bothers me.” Ms. Nesmith noted that Ms. St. Clair related that appellant did not mention that she aggravated the injury or that she just had an accident that caused a left shoulder injury. She questioned why appellant did not seek medical attention until the next day. Additionally, Ms. Nesmith explained that no lifting was involved at the time of the incident, unless it was the pallet bundles that came into the area. She noted that appellant would use a metal pole to pull the bundles off the pallets onto the belt for processing and removing plastic straps or wrapping bundles and placing them into trays on a conveyor belt. Ms. Nesmith advised that appellant had a discussion with her supervisor about her work attendance and untimely absences the day before the alleged injury. She asserted that appellant filed her traumatic injury claim to avoid discipline.

Ms. Nesmith stated that appellant felt okay at 6:00 p.m., and did not report feeling left shoulder pain or discomfort until 8:45 p.m. when she was prepping mail. She questioned that, “if a serious injury had taken place, why did n[ot] [appellant] simply say she had experienced an accident which caused her injury to her shoulder and seek medical attention?” Ms. Nesmith asserted that the alleged incident was “suspect” as to where and how appellant injured her shoulder.

Ms. Nesmith provided statements dated June 3, 2013 from Juanita Sumpter, a supervisor, and Ms. St. Clair. Ms. St. Clair noted that on June 2, 2013 at 9:00 p.m. she and her supervisor were discussing work matters when appellant walked up and stood there for a moment. Ms. Sumpter asked appellant what was wrong and she responded that she had surgery and “every

now and then her shoulder bothers" her. She stated that on June 2, 2013 appellant never told her that she had an accident. Ms. Sumpter stated that appellant told her she wanted to go home because she was not feeling well. She noted that appellant indicated that her shoulder bothered her when the weather was bad and rainy.

In a June 8, 2013 statement, Joseph Maresca, a distribution operations supervisor, indicated that he had spoken to appellant about her excessive absences on May 31, 2013. He advised her that her attendance record was unacceptable.

In June 4, 2013 emergency room notes and discharge instructions, Dr. Shideh Parsa, an emergency medicine specialist, noted that appellant arrived with complaints of left shoulder pain. She indicated that appellant related "[t]he pain began [three] days ago, worse with movement and no recollection of injury." Dr. Parsa diagnosed left shoulder strain.³

By letter dated June 13, 2013, OWCP advised appellant that additional evidence was needed to establish her claim. It particularly asked her to explain the specific tasks she believed caused her injury and how this occurred. OWCP also asked that appellant respond to the employing establishment's challenge to the claim and explain why she did not seek medical treatment sooner.

A June 14, 2013 magnetic resonance image (MRI) scan read by Dr. Reza Hedayari, a diagnostic radiologist, revealed a cystic lesion in the head of the humerus and signal abnormalities in the supraspinatus tendon. A June 17, 2013 duty status report and disability certificate, from an individual whose signature is illegible, noted that appellant had left shoulder pain and limited range of motion. The provider advised that appellant could return to work on June 28, 2013.

In a June 27, 2013 report, Dr. Paul G. Kleinman, a Board-certified orthopedic surgeon, noted that on June 2, 2013 appellant was lifting and pulling things and developed left shoulder pain. He advised that she had open shoulder surgery for a rotator cuff tear two and a half years ago and was not working since the June 2, 2013 accident. Dr. Kleinman examined appellant and determined that she had left shoulder impingement syndrome status post rotator cuff repair. In a separate June 27, 2013 report, he indicated that she could not work until further notice.

In a June 29, 2013 statement, appellant explained her duties and noted that she believed that what contributed to her condition were the multiple tasks that she was doing on the "AI" machine and the "SPBS" machine, in which she received no assistance. She stated that it was repetitive work and contributed to her pain. Appellant denied that she informed her supervisor that she was not feeling well. She stated that she told her supervisor that she had left shoulder pain. Appellant denied that she was given a discussion the day before her injury related to her absences, but that it had occurred about two weeks before her injury. She denied any other injury. Appellant indicated that, before her June 2, 2013 injury, she had no symptoms of pain or discomfort. She also stated that her regular physician could not see her, so she went to the emergency room. OWCP also received notes from a physician assistant.

³ The report actually indicates the right shoulder strain but this appears to be a typographical error.

By decision dated July 17, 2013, OWCP denied appellant's claim and found that the medical evidence did not demonstrate that the claimed medical condition was related to established work-related events.

On August 13, 2013 appellant requested a review of the written record. She indicated that she misinterpreted what OWCP asked in its development letter with regard to whether she had symptoms before June 2, 2013. Appellant explained that the answer should have been "yes" as she experienced symptoms related to her May 11, 2010 job-related injury. She also reiterated that she believed that her injury on June 2, 2013 was caused by her job duties.

OWCP received a June 23, 2011 report and a January 26, 2012 report pertaining to a May 11, 2010 injury from Dr. Stuart Remer, a Board-certified orthopedic surgeon. It also received a September 14, 2010 operative report for a left rotator cuff tear, synovitis and impingement, and several reports and treatment notes from 2010 and 2011. OWCP also received copies of previously submitted reports.

In reports dated July 25 and August 1, 2013, Dr. Kleinman noted that appellant still had left shoulder pain with forward elevation, although she had good forward elevation. He indicated that he provided a return to work note and opined that her current symptoms were related to the June 2, 2013 accident and her previous accident of May 11, 2010. Dr. Kleinman opined that the incident appellant described was the competent medical cause of her injury and her complaints were consistent with her history of injury. He also indicated that the history of injury was consistent with his objective findings. Dr. Kleinman indicated that appellant was 100 percent disabled until August 3, 2013 and not disabled after August 4, 2013. In an August 1, 2013 disability certificate, he indicated that she could return to full duty on August 4, 2013.

In an April 25, 2014 letter, Ms. Nesmith noted appellant's prior injury and that a second opinion physician had found her capable of returning to her date-of-injury job, full time, and without restrictions. She reiterated that appellant did not request immediate medical attention at the time of the most recent claimed injury.

By decision dated June 23, 2014, an OWCP hearing representative modified the June 17, 2013 decision. She found that the evidence did not demonstrate that a specific event, incident, or exposure occurred at the time, place, and in the manner alleged.⁴

LEGAL PRECEDENT

An employee seeking benefits under FECA⁵ 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

⁴ The hearing representative noted that appellant attributed her condition to dumping, loading, pushing, and using a staff to unload mail. She noted that the employing establishment and a coworker both indicated that appellant advised them she was not feeling well and never informed them that she had injured herself. The hearing representative also indicated that, while appellant denied being warned about her leave usage on May 31, 2013, a supervisor confirmed that he had spoken to her on that date about her attendance. She concluded that the inconsistent accounts of the alleged work incident disputed the factual component of the claim.

⁵ 5 U.S.C. §§ 8101-8193.

States” within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA,⁶ and that an injury was sustained in the performance of duty.⁷ These are the essential elements of each compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁸

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 actually experienced the employment incident at the time, place, and in the manner alleged.⁹ In some traumatic injury cases, this component can be established by an employee’s uncontested statement on the Form CA-1.¹⁰ 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.¹¹

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 subsequent course of action.¹² 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.¹³ 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.¹⁴ 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,¹⁵ 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.¹⁶

⁶ *Joe D. Cameron*, 41 ECAB 153 (1989).

⁷ *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁸ *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁹ *Julie B. Hawkins*, 38 ECAB 393, 396 (1987); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2a (June 1995).

¹⁰ *John J. Carbone*, 41 ECAB 354 (1989).

¹¹ See *id.* For a definition of the term “injury,” see 20 C.F.R. § 10.5(ee).

¹² *Rex A. Lenk*, 35 ECAB 253, 255 (1983).

¹³ *Id.* at 255-56.

¹⁴ *Dorothy M. Kelsey*, 32 ECAB 998 (1981).

¹⁵ *Id.*

¹⁶ *Joseph A. Fournier*, 35 ECAB 1175 (1984).

ANALYSIS

The Board finds that appellant has not established fact of injury due to inconsistencies in the evidence that cast serious doubt as to whether the specific traumatic incident occurred at the time, place, and in the manner alleged.

The Board finds that appellant's statements are insufficient to establish fact of injury due to the conflicting evidence regarding the time, place, and manner in which the alleged incident occurred. On her traumatic injury claim form, which was filed on June 3, 2013, appellant claimed to have reinjured her left arm unloading a machine in the performance of duty. The employing establishment specifically controverted the claim and noted that no specific time of injury had been provided. In June 3 and 29, 2013 statements, appellant explained that on June 2, 2013 she felt okay at 6:00 p.m., but she felt pain and discomfort in her left shoulder as she was prepping mail around 8:45 p.m. She stated that she immediately reported this to her supervisor and, when the pain did not subside, she asked if she could go home. Appellant then sought medical treatment the next day when she still had pain. She denied informing her supervisor that she was not feeling well, but rather alleged that she informed her supervisor of left shoulder pain.¹⁷ Appellant also denied having a recent supervisory discussion related to her absences.

The employing establishment disputed the claim in June 7, 2013 and April 25, 2014 statements. Ms. Nesmith advised that appellant's supervisor had never been informed by appellant of a June 2, 2013 injury but instead advised that appellant wanted to go home because "she wasn't feeling well" as her arm and shoulder would hurt in bad weather. She indicated that Ms. St. Clair, a coworker, stated that, when she asked appellant what was wrong, she grabbed her left shoulder and responded, "I had surgery and every now and then my shoulder bothers me."¹⁸ Ms. Nesmith asserted that appellant filed her traumatic injury claim to avoid disciplinary action as, the day before the alleged injury, appellant's supervisor had a discussion with appellant about her attendance.¹⁹ The Board notes that these statements and supporting documents provided by the employing establishment show inconsistencies with appellant's account of how the claimed injury occurred and events occurring near the time of the claimed injury.

Furthermore, Dr. Parsa's June 4, 2013 emergency room report reflects appellant's claim that the left shoulder pain began "[three] days ago, worse with movement and no recollection of injury." While Dr. Kleinman's June 27, 2013 report provided a history of appellant developing

¹⁷ Appellant initially indicated that before her June 2, 2013 injury, she had no symptoms. On August 13, 2013 she indicated that she misinterpreted what was asked of her and acknowledged that she had symptoms related to her May 11, 2010 injury. Appellant reiterated that she believed that her injury on June 2, 2013 was caused by her job duties.

¹⁸ In a June 3, 2013 statement, Ms. St. Clair noted that on June 2, 2013 at 9:00 p.m. appellant stated that she had undergone surgery and told Ms. St. Clair that "every now and then her shoulder bothers" her when she asked appellant what was wrong. In another June 3, 2013 statement, Ms. Sumpter stated that, on June 2, 2013, appellant did not tell her that she had an accident. She stated that appellant told her she wanted to go home because she was not feeling well, indicating that her shoulder bothered her when the weather was bad and rainy.

¹⁹ In a June 8, 2013 statement, Mr. Maresca, a distribution operations supervisor, indicated that he spoke to appellant on May 31, 2013 about her unacceptable attendance record.

left shoulder pain while lifting and pulling things, the Board has held that contemporaneous evidence is entitled to greater probative value than later evidence.²⁰

The circumstances of this case, therefore, cast serious doubt upon the occurrence of a June 2, 2013 incident in the manner as described by appellant. Given the inconsistencies in the evidence regarding how she sustained this injury, the Board finds that there is insufficient evidence to establish that appellant sustained a traumatic incident in the performance of duty as alleged.²¹

As appellant has not established that the claimed incident occurred, it is not necessary to consider the medical evidence with respect to causal relationship.²²

On appeal, appellant argued that Ms. St. Clair was a part of management and was not telling the truth. She questioned why she was not written up if that was the case. Appellant argued that management engaged in a “witch hunt.” She also denied that she got hurt to avoid discipline. As explained, the weight of the evidence submitted to OWCP does not establish that the claimed incident occurred as alleged.

Appellant may submit new evidence or argument with a 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 meet her burden of proof in establishing that she sustained a traumatic injury in the performance of duty on June 2, 2013.

²⁰ S.S., 59 ECAB 315 (2008).

²¹ See *Matthew B. Copeland*, 6 ECAB 398, 399 (1953) (where the Board found that discrepancies and inconsistencies in appellant's statements describing the injury created serious doubts that the injury was sustained in the performance of duty); see also *Mary Joan Coppolino*, 43 ECAB 988 (1992).

²² S.P., 59 ECAB 184 (2007) (where a claimant did not establish an employment incident alleged to have caused his or her injury, it was not necessary to consider any medical evidence).

ORDER

IT IS HEREBY ORDERED THAT the June 23, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 7, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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