United States Department of Labor
Employees' Compensation Appeals Board

J.R., Appellant	)	
and	)	**Docket No. 14-1870**
	)	**Issued: January 13, 2015**
DEPARTMENT OF THE INTERIOR, UPPER COLORADO REGION, Salt Lake City, UT, Employer	)	

Appearances:
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
PATRICIA HOWARD FITZGERALD, Judge

JURISDICTION

On August 25, 2014 appellant filed an appeal from a July 7, 2014 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.[2]

ISSUE

The issue is whether appellant met his burden of proof to establish a traumatic injury in the performance of duty on July 24, 2013.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that appellant submitted additional evidence following the July 7, 2014 decision. Because the Board's jurisdiction is limited to evidence that was before OWCP at the time it issued its final decision, the Board may not consider this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c); *Sandra D. Pruitt*, 57 ECAB 126 (2005). Appellant may submit that evidence to OWCP along with a request for reconsideration.

FACTUAL HISTORY

On August 1, 2013 appellant, then a 39-year-old engineering equipment operator, filed a traumatic injury claim (Form CA-1) alleging that at 3:00 p.m. on July 24, 2013, he was operating a backhoe loading trucks at the employing establishment and the resulting bouncing and jerking motions caused lower back pain. He stopped work on July 31, 2013.

In a note dated August 5, 2013, Dr. Ravi Bhasker, Board-certified in family medicine, stated that appellant had reinjured his back. He stated that "[appellant's] last MRI [magnetic resonance imaging] [scan] in May 2013 showed the lower back to have L1-L2 and L5-S1 with subtle minimal disc bulges. [Appellant] continues to have pain that radiates down both legs." Dr. Bhasker recommended that appellant try to retire and stated that he should have 40 days off "to try to help him settle the pain and the radiculopathy." Appellant also submitted a note signed by a physician's assistant dated July 31, 2013.

On September 4, 2013 Dr. Bhasker stated that appellant had injured his back several years prior but that he had recently injured his back in July 2013. Appellant was given six months to reach maximum medical improvement and a recommendation for physical therapy. Dr. Bhasker noted that he would be following appellant on a monthly basis and recommended that he return to regular duty on September 16, 2013.

In a progress note dated October 2, 2013, Dr. Bhasker stated that appellant injured himself while working on heavy equipment and that he had a history of low back pain, herniated discs, and degenerative discs. He stated that appellant was working.

Dr. Bhasker stated in a November 5, 2013 report that appellant had a herniated disc in his lower back at L4-L5 with radiculopathy and sciatic impingement syndrome. He noted that appellant continued to work full time.

In a note dated December 4, 2013, Dr. Bhasker stated that appellant was a heavy equipment operator who injured his back at work. On examination, he observed tenderness at L3-L4 with limited flexion and extension, as well as a positive left leg raise sign.

Dr. Bhasker noted on January 8, 2014 that appellant continued to perform light duty while loading heavy equipment, but that he was not using the heavy equipment himself. He reported that appellant had severe low back pain from his herniated disc.

In a progress note dated February 11, 2014, Dr. Bhasker stated that appellant was contemplating retirement due to persistent pain. He noted that appellant should continue medium duty.

Upon examination on February 19, 2014, Dr. Bhasker diagnosed a herniated disc and degenerative arthritis. He noted that appellant "has not been operating equipment anymore and usually is driving equipment to one place or another for the company that he works for. I am giving him a note stating that he can do medium-duty work but no heavy equipment operating, but, he can go ahead and drive a semi that will take loaded equipment to different parts of the state."

In a note dated March 11, 2014, Dr. Bhasker stated that appellant had a long history of low back pain and a herniated disc. He stated that appellant was "attempting to work where he is a driver for heavy equipment and he does operate heavy equipment, but we have given him a note that he should only drive at his own pace."

On April 22, 2014 Dr. Bhasker stated that appellant had "chronic low back pain with radiculopathy secondary to his work-related job." He noted that appellant complained on this visit of mid-epigastric pain that radiated to the back.

By letter dated June 2, 2014, OWCP advised appellant of the deficiencies in his claim. It stated that his claim had been reopened for consideration because medical bills had exceeded $1,500.00. OWCP noted that appellant had not provided sufficient evidence to establish that he actually experienced an incident alleged to have caused injury, and asked that he submit a response to its questionnaire to substantiate the factual elements of his claim. Appellant was asked to provide a detailed description of how his injury occurred, the immediate effects of his injury, and a description of his condition between the date of injury and the date he first received medical attention. OWCP also asked him to submit medical evidence in support of his claim. It afforded appellant 30 days to submit this additional evidence. Appellant did not respond.

An additional progress note from Dr. Bhasker, dated May 21, 2014, stated that appellant continued to have low back pain, and that he had degenerative arthritis of his low back with radiculopathy into the left leg.

By decision dated July 7, 2014, OWCP denied appellant's claim on the grounds that the evidence submitted was not sufficient to establish the factual component of fact of injury, as he had not responded to its inquiries. It stated that the evidence did not support that the injury or event occurred as described.

LEGAL PRECEDENT

An employee seeking benefits under FECA[3] 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[4] was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.[5]

[3] 5 U.S.C. §§ 8101-8193.

[4] OWCP's regulations define a traumatic injury as a condition of the body caused by a specific event or incident, or series of events of incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain, which is identifiable as to time and place of occurrence and member or function of the body affected. 20 C.F.R. § 10.5(ee).

[5] *T.H.*, 59 ECAB 388, 393 (2008); *see Steven S. Saleh*, 55 ECAB 169, 171-72 (2003); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether a "fact of injury" has been established. A fact of injury determination is based on two elements. 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 sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury. An employee may establish that the employment incident occurred as alleged but fail to show that his or her condition relates to the employment incident.[6]

With respect to the first component of fact of injury, 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.[7] 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.[8] An employee 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.[9] 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.[10] 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.[11]

ANALYSIS

Appellant must establish all of the elements of his claim in order to prevail. He must prove his employment; the time, place, and manner of injury; a resulting personal injury, and that his injury arose in the performance of duty.[12] Appellant alleged that he sustained a back injury on July 24, 2013 as a result of bouncing and jerking motions while operating a backhoe loading trucks. The Board finds that appellant has not met his burden of proof to establish that the incident of July 24, 2013 occurred as alleged because he has not sufficiently described the time, place, and manner of his injury.

[6] *Id*. *See Shirley A. Temple*, 48 ECAB 404, 407 (1997); *John J. Carlone* 41 ECAB 354, 356-57 (1989).

[7] *William Sircovitch*, 38 ECAB 756, 761 (1987); *John G. Schaberg*, 30 ECAB 389, 393 (1979).

[8] *Charles B. Ward*, 38 ECAB 667, 670-71 (1987); *Joseph Albert Fournier, Jr.*, 35 ECAB 1175, 1179 (1984).

[9] *Tia L. Love*, 40 ECAB 586, 590 (1989); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

[10] *Samuel J. Chiarella*, 38 ECAB 363, 366 (1987); *Henry W.B. Stanford*, 36 ECAB 160, 165 (1984).

[11] *D.B.*, 58 ECAB 464, 466-67 (2007); *Robert A. Gregory*, 40 ECAB 478, 483 (1989).

[12] *See R.Z.*, Docket No. 13-1911 (issued September 15, 2014).

Appellant did not provide a clear factual statement identifying how operating a backhoe loading trucks on July 24, 2013 was alleged to have caused his back condition. On June 2, 2014 OWCP advised him of the deficiencies in his claim. It noted that appellant had not provided sufficient evidence to establish that he actually experienced an incident alleged to have caused injury, and asked that he submit a response to its questionnaire to substantiate the factual elements of his claim. Appellant was asked to provide a detailed description of how the injury occurred, the effects of the injury, and a description of his condition until he sought medical attention. OWCP afforded him 30 days to submit this additional evidence. Appellant did not provide any statement responding to OWCP's inquiry.

The Board notes that appellant has offered no explanation as to why he continued to work until July 31, 2013, when the injury occurred on July 24, 2013. The Board further notes that while he sought medical care on July 31, 2013, none of the medical evidence of record documents that he sustained a work injury on July 24, 2013. These inconsistences in the evidence of record cast sufficient doubt on an employee's statements in determining whether a *prima facie* case has been established.

Thus, the Board finds that appellant has not sufficiently established the time, place, and manner of the traumatic incident of July 24, 2013 to meet his burden of proof.[13] As appellant has not established the factual component of his claim, the Board will not address the medical evidence as it relates to a diagnosis of an incident in connection with the incident of July 24, 2013 or the causal relationship between this incident and appellant's alleged injury.[14]

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish a traumatic injury in the performance of duty on July 24, 2013.

[13] *See C.J.*, Docket No. 12-1927 (issued March 29, 2013); *C.G.*, Docket No. 11-1897 (issued April 24, 2012).

[14] *See Bonnie A. Contreras*, 57 ECAB 364 (2006).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 7, 2014 is affirmed.

Issued: January 13, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board