United States Department of Labor
Employees' Compensation Appeals Board

T.D., Appellant	)	
and	)	
DEPARTMENT OF THE ARMY, ARMY TANK-AUTOMOTIVE ARMAMENTS COMMAND, RED RIVER ARMY DEPOT, Texarkana, TX, Employer	)	**Docket No. 15-558** **Issued: May 26, 2015**

Appearances:
Lonnie Boylan, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 21, 2015 appellant, through counsel, filed a timely appeal from the November 4, 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.

ISSUE

The issue is whether appellant established that he sustained an employment-related injury on September 11, 2013, as alleged.

On appeal appellant's counsel argued that appellant established that an incident occurred in the performance of duty, and requested that the case be remanded for a *de novo* decision

[1] 5 U.S.C. § 8101 *et seq.*

finding that the evidence was sufficient to establish fact of injury, performance of duty, and causal relationship warranting the acceptance of appellant's claim.

FACTUAL HISTORY

On September 25, 2013 appellant, then a 53-year-old heavy mobile equipment mechanic inspector, filed a traumatic injury claim alleging that on September 11, 2013, while removing the flywheel of a C15 caterpillar engine, he felt a sharp pain in his right shoulder. He listed the nature of his injury as right shoulder strain.

The employing establishment controverted the claim alleging lack of evidence establishing fact of injury and lack of medical evidence proving that appellant's condition was related to his employment. In an unsigned attached preliminary incident report dated September 2013, Gerard Watkins listed both the date of the incident and the date it was reported as September 11, 2013. He indicated that his investigation revealed that appellant has been employed as a mechanic for 5 to 10 years, if he was injured at work no witness statements show that he reported the incident when it occurred, and that appellant was aware of reporting procedures. If the incident occurred, Mr. Watkins argued that contributing factors were improper workplace ergonomics and failure to use buddy system with awkward loads. The report indicated that the supervisor will follow up so all employees will have proper brackets installed for the use of an overhead crane. The report concluded that "The fact that no one at the work site [noticed appellant] hurt is somewhat remarkable as well as questionable in that work area is very populated with other employees. It is unfortunate that [appellant] had a personal injury with sharp pain in his arm but it is very doubtful that it happened at [the employing establishment]."

Appellant received treatment on October 2, 2013 from Dr. Darius F. Mitchell, a Board-certified orthopedic surgeon, who noted that appellant told him that on September 11, 2013 he had a sharp pain in his right shoulder while removing a flywheel from an engine, and that since then he has had pain at night and pain with overhead activities. Dr. Mitchell stated that appellant most likely had a rotator cuff tear. An x-ray taken on that date showed no acute fracture or other bony abnormality.

By letter dated October 25, 2013, OWCP informed appellant that further information was necessary for approval of his claim.

Appellant submitted a statement indicating that on September 11, 2013 he was unrigging a C15 caterpillar engine. He noted that his employing establishment had been in the process of installing a lifting device for over a year now, due to prior safety issues of handling the heavy components, and that the lifting device was put into operation on November 19, 2013. Appellant noted that, as he removed the last bolt from the flywheel, and the flywheel dropped about an inch to rest in bell housing, and that at this point he held the flywheel in the bell housing with both hands, and grasped the three inch center hold with his right hand and then lifted up and out. He stated that as the flywheel cleared the weight shifted like a pendulum and that is when he felt a sharp pain his right shoulder. Appellant noted that he immediately reported the incident to his supervisor, who filled out a report of injury and sent him to the dispensary. He noted that the employing establishment's doctor evaluated his condition, prescribed pain and muscle relaxer medications, and placed him on light duty. Appellant also included an undated statement by

Jonathan Runnels, his supervisor, indicating that appellant was a trustworthy employee, that he reported to him that he was injured while removing a flywheel, and that this task could cause such an injury as appellant described. He noted that the flywheel lifting device that was installed could not be used at that time due to the flywheel racks not being fabricated. Appellant noted that this lifting device was purchased to hopefully keep injuries like this from happening. He also submitted a statement signed by seven of his colleagues, attesting that they have lifted by hand the flywheels and dampeners that mount it to the engine, and that the components weighing in excess of 75 pounds. They understood how easy it would be to strain and put undue pressure on the back, arm, and shoulders. The statement indicated that this chore was often done alone. The statement noted that there is a lifting device to do this task now, but that the lifting unit did not have the necessary components until November 19, 2013 to make it functional.

The record also contains a form by Robert Houser, a physician's assistant for the employing establishment, indicating that he saw appellant for a follow-up appointment on September 25, 2013 with regard to right shoulder pain due to a rotator cuff tear. Mr. Houser listed the date of injury as September 11, 2013.

By decision dated November 26, 2013, OWCP denied appellant's claim, finding that he had not established fact of injury.

On August 8, 2014 appellant, through counsel, requested reconsideration. At that time, appellant's counsel noted that OWCP had never addressed the statements appellant submitted. He asserted that an injury need not be observed by witnesses and, that the evidence established that the employment incident occurred as alleged. Counsel argued that a causal relationship between the employment incident and appellant's medical diagnoses had been established. An injury compensation program administrator responded for the employing establishment and argued that investigations had been performed that found appellant was at fault because he was in direct violation of safety procedures. The employing establishment reiterated that appellant worked around other employees who would have noticed an injury if the incident happened at work. It also stated that appellant's supervisor did not submit a statement until almost one year after the alleged incident.

In a March 5, 2014 report, Dr. Mitchell reviewed the results of the February 28, 2014 magnetic resonance imaging (MRI) scan by Dr. Allen Havener, a Board-certified radiologist. Dr. Havener and Dr. Mitchell noted: (1) disruption of the superior glenohumeral ligament with abnormal signal intensity in the rotator cuff interval as well as biceps tendinosis, probable rotator cuff interval tear (hidden lesion); (2) partial tear of the subscapularis tendons undersurface; (3) notch in the numeral head superolaterally in a typical position for Hill-Sachs deformity with ventral capsular stripping and diminutive anterior labrum which could be correlated with a prior anterior shoulder dislocation; and (4) probable Buford complex which in view of the diminutive anterior labrum, may be related to an anterior labral tear as well. Dr. Mitchell noted that his examination of March 5, 2014 showed positive anterior apprehension, positive crank test, weakly positive Hawkins and Neer, negative crossover adduction, and positive Speed and O'Brien tests. In a July 9, 2014 report, he described appellant's work injury of September 11, 2013, noted that appellant continued to experience sharp right shoulder pain with certain movements, and that appellant continued to have pain with limited mobility in his shoulder especially with overhead activities. Dr. Mitchell opined that the workplace exposure, the physiological mechanism of the

lifting, and the weight shifting of the 110-pound flywheel was the cause of appellant's diagnosis. He noted that appellant's lifting the flywheel and sudden shifting of his weight could tear a supraspinatus tendon which would reasonably explain his diagnosis. Dr. Mitchell suggested that appellant have an arthroscopy with a possible biceps tenodesis and rotator cuff repair.

Appellant also submitted a report by Mr. Houser noting that he treated appellant on September 11, 2013 for right shoulder pain following an injury of that date that occurred when he was removing a flywheel from an engine and felt sharp pain in his right shoulder.

By decision dated November 4, 2014, OWCP denied modification of the November 26, 2013 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[2] has the burden of establishing that 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 caused 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.[3] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[4]

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. 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.[5] 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.[6]

OWCP cannot accept fact of injury if there are such inconsistencies in the evidence as to seriously question whether the specific event occurred at the time, place, and in the manner alleged, or whether the alleged injury was in the performance of duty,[7] nor can OWCP find fact of injury if the evidence fails to establish that the employee sustained an injury within the meaning of FECA. 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 as alleged, but the employee's statements must be consistent with surrounding facts and circumstances and his

[2] *Supra* note 1.

[3] *Joe D. Cameron*, 42 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[4] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[5] *John J. Carlone*, 41 ECAB 354 (1989).

[6] *Id.*

[7] *Pendleton, supra* note 3

subsequent course of action.[8] 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.[9]

ANALYSIS

Appellant alleged that he sustained an injury to his right shoulder on September 11, 2013 while removing the flywheel of a C15 caterpillar engine. The employing establishment controverted the claim, arguing that the alleged injury occurred in an area where many of the employees worked and that appellant offered no witness statements from the time of his injury.

Appellant submitted a statement explaining that on September 11, 2013 he was rigging a C15 caterpillar engine. When he removed the last bolt from the flywheel, the flywheel dropped about an inch to the bell housing. Appellant had to hold the flywheel in the bell housing with both hands, and grasped the flywheel with his right hand and lifted it up and out. He stated that he felt a sharp pain in his right shoulder.

Appellant stated that he immediately reported the incident to his supervisor, who filled out a report of injury and sent him to the dispensary.

The Board finds that the evidence does not cast serious doubt on whether an incident occurred on September 11, 2013. Mr. Runnels, appellant's supervisor, confirmed that appellant reported the injury to him. Appellant was seen by Mr. Houser, a physician's assistant, at the employing establishment on the date of the September 11, 2013 incident, and the factual presentation given to Mr. Houser is consistent with appellant's allegations. The employing establishment emphasized that the alleged incident was apparently not witnessed. It argues that someone would have seen the accident if it had occurred. However, seven of appellant's colleagues signed a statement indicating that this work was often done in a relatively secluded area. Although appellant's colleagues did not witness the accident, they undermine the employing establishment's argument that the work was always done in a crowded area. Accordingly, under the circumstances of this case, the Board finds that appellant's allegations have not been refuted by strong or persuasive evidence.[10]

The next issue is whether this incident caused an injury.[11] There is medical evidence in the record addressing appellant's employment incident of September 11, 2013 and its causal relationship to a shoulder injury. This includes reports by Dr. Mitchell and an MRI scan by Dr. Havener. Dr. Mitchell described in detail appellant's employment incident of September 11,

[8] *See D.T.*, Docket No. 15-143 (issued February 18, 2015); *see also Joseph H. Surgener*, 42 ECAB 541, 547 (1991).

[9] *See Gregory J. Reser*, 57 ECAB 277 (2005); *D.B.*, Docket No. 14-924 (issued November 3, 2014).

[10] *See D.S.*, Docket No. 11-634 (issued October 5, 2011); *H.H.*, 59 ECAB 461 (2008).

[11] A traumatic injury means a condition of the body caused by a specific event or incident or series of events or 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).

2013 and discussed the MRI scan by Dr. Havener. He noted multiple positive findings, including a possible rotator cuff tear, which he attributed to the September 11, 2013 incident. However, because OWCP denied appellant's claim and found that he did not establish fact of injury, it has never reviewed the medical evidence submitted in support of his claim.[12] The Board will therefore set aside the November 4, 2014 decision and remand the case to OWCP to review of the medical evidence and issue a *de novo* decision on his entitlement to compensation.

CONCLUSION

The Board finds that this case is not in posture for decision. The weight of the factual evidence established that the incident occurred as alleged. OWCP must now determine whether the medical evidence establishes that the incident caused an injury.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 4, 2014 is modified in part, set aside in part and remanded for further action consistent with this opinion.

Issued: May 26, 2015
Washington, DC

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

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

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

[12] *See J.T.*, Docket No. 14-1740 (issued December 11, 2014).