United States Department of Labor
Employees' Compensation Appeals Board

A.M., Appellant **and** **DEPARTMENT OF DEFENSE, DEFENSE AGENCIES, New Cumberland, PA, Employer**	**Docket No. 15-0526** **Issued: November 20, 2015**

Appearances:
Randolph Elliott, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 9, 2015 appellant, through her representative, filed a timely appeal from a September 25, 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 her burden of proof to establish a work-related incident in the performance of duty on June 11, 2013.

[1] 5 U.S.C. § 8101 *et seq.*

[2] Appellant timely requested oral argument pursuant to section 501.5(b) of the Board's *Rules of Procedure*. 20 C.F.R. § 501.5(b). By order dated October 8, 2015, the Board denied the request, finding that the arguments on appeal could adequately be addressed based on the case record. *Order Denying Request for Oral Argument*, Docket No. 15-0526 (issued October 8, 2015). The Board's *Rules of Procedure* provide that any appeal in which a request for oral argument is not granted by the Board will proceed to a decision based on the case record and any pleadings submitted. 20 C.F.R. § 501.5(b).

On appeal appellant's representative asserts that the medical evidence of record is sufficient to establish fact of injury and that an OWCP hearing representative committed error in modifying the decision to reflect that the evidence did not establish that the injury occurred at the time, place, and in the manner alleged, thus not allowing appellant the opportunity to answer this contention.

FACTUAL HISTORY

On June 26, 2013 appellant, then a 36-year-old distribution process worker, filed a traumatic injury claim (Form CA-1) alleging that on June 11, 2013 she sustained a lumbar strain/sprain, tear, and bulging disc when lifting and moving a box at work. Afterward, she noticed soreness, tightening, and stiffness in her lower back. The employing establishment controverted the claim, stating that causal relationship had not been established. In a June 20, 2013 statement, appellant maintained that on June 11, 2013 she arrived at work symptom free, and that around her lunch break, she noticed soreness, tightening, and stiffness in her lower back after she picked up a box and moved it. She stated that she was beginning her menstrual cycle, but that the pain was more severe than usual, and that when her cycle ended on June 18, 2013 she became concerned because the back pain was increasing in severity. Appellant then reported the injury to her supervisor.

By letter dated July 12, 2013, OWCP informed appellant of the evidence needed to support her claim. This was to include a physician's opinion, supported by a medical explanation, as to how the reported work incident caused or aggravated a medical condition.

On June 20, 2013 J.T. Crook, of the employing establishment office of safety and occupational health, acknowledge that appellant reported the claimed June 11, 2013 incident to her supervisor on June 18, 2013. He noted that she complained of mild back pain on June 11, 2013 but continued to work. Mr. Crook advised that appellant was diagnosed with a herniated disc and put on restricted duty of no lifting over 10 pounds. He maintained that the injury might be considered a cumulative injury and it would be more appropriate for appellant to file an occupational disease claim.

Medical evidence submitted in support of appellant's claim includes a June 19, 2013 report in which Dr. Michael B. Furman, Board-certified in physical medicine and rehabilitation and pain medicine, reported that appellant's pain began on approximately June 11, 2013, but that she did not remember any specific event. He noted that her job entailed repetitive packing and lifting up to 40 pounds and that she was currently working full time without restrictions. Dr. Furman found lower lumbosacral spine tenderness and diminished range of motion and diagnosed neuritis or radiculitis of the thoracic or lumbosacral spine, and lumbar intervertebral disc displacement without myelopathy. He recommended a magnetic resonance imaging (MRI) scan and medication, and advised that appellant should avoid excessive twisting, pulling, and bending at work, with a 20-pound weight restriction.

A June 20, 2013 MRI scan of the lumber spine demonstrated degenerative disc disease with a central annular fissure and a bulging disc at L5-S1 that mildly compressed the thecal sac.

In a report dated June 25, 2013, Dr. Furman noted appellant's continued complaints of back pain and that she was working modified duties. He discussed the MRI scan study findings, described her physical examination, and provided work limitations of occasional stooping, bending, rotating, twisting, and lifting, with carrying, pushing, and pulling limited to 20 pounds. Dr. Furman advised that appellant's acute flare of pain was most likely from disc herniation and opined, "based on the history, it is work related." On an attending physician's report dated July 1, 2013, he reiterated his diagnosis and checked a form box marked "yes," indicating that the diagnosis was work related, stating that it was caused or aggravated by "repetitive lifting twisting activities." Dr. Furman repeated his restrictions on a duty status report that day. In reports dated July 2, 2013, he described appellant's examination findings and treatment, and continued work restrictions.

On July 9, 2013 Dr. James Gilhool, also Board-certified in physical medicine and rehabilitation and pain medicine and an associate of Dr. Furman, performed an epidural steroid injection. On July 11, 2013 Dr. Furman reported that the epidural injection only briefly relieved appellant's back pain. He repeated his work limitations, with a 10-pound weight restriction.

By decision dated August 19, 2013, OWCP found that appellant established that the claimed employment incident occurred on June 11, 2013 as alleged, but denied the claim because the medical evidence did not demonstrate that a diagnosed condition was causally related to the accepted incident.

Appellant timely requested a hearing before an OWCP hearing representative and submitted medical evidence previously of record. On August 26, 2013 Dr. Furman reported her complaint of low back pain and that she continued to work limited duty. He described appellant's report that she recalled lifting a box on June 11, 2013 and that she felt that this could be what initially caused her pain. Dr. Furman continued the 10-pound weight restriction and advised that, "by history, it still sounds as though the pain began with a work-related event." On September 23, 2013 he reported persistent low back pain. Dr. Furman increased appellant's lifting restriction to 20 pounds. On October 28, 2013 he noted that she had no low back pain for three weeks and that she felt that she could return to full duty, with a 40-pound lifting restriction.

At the hearing held on July 10, 2014 appellant's representative stated that the box appellant lifted on June 11, 2013 was 16 x 16 x 16 and weighed 35 pounds. He referenced an addendum report from Dr. Furman. Appellant testified that she knew something happened to her back when she lifted the box because she had never before felt that kind of pain. She stated that on June 18, 2013 she first visited Dr. W. Scott Wolfe, a Board-certified family physician, and that he referred her to Dr. Furman. The hearing representative advised appellant to submit Dr. Wolfe's report and informed her of the medical evidence needed to support her claim. The record was held open for 30 days.

Dr. Furman later tries to clarify his June 19, 2013 treatment note. First on August 26, 2013, he had advised that the June 19, 2013 note should have read that appellant "has a repetitive job of packing. [Appellant] thinks [the injury] may have occurred on the job because of this activity." Dr. Furman indicated that a comment denying trauma should not have been included in that earlier treatment note. On September 6, 2013 he stated, "To clarify: Based on the history

and mechanism, this is a work-related injury." Then on August 15, 2014 Dr. Furman clarified by stating appellant "experienced pain after lifting a large box at work."

By decision dated September 25, 2014, an OWCP hearing representative modified the August 19, 2013 decision to reflect that appellant failed to establish that she sustained a traumatic injury at the time, place, and in the manner alleged. The hearing representative noted that she continued to work regular duty until June 20, 2013, did not report the injury, did not seek medical care for over a week, and that she failed to submit the initial treatment records from her family physician as requested. He further found that Dr. Furman did not initially support that appellant sustained a traumatic injury, noting that he indicated that her condition was likely due to repetitive work activities, and it was only in August 2014, over a year after her initial office visit, that she reported that she had experienced pain after lifting a box. The hearing representative concluded that Dr. Furman had failed to explain why his initial notes did not contain that information and/or why he had advised that her condition was related to her repetitive duties. He affirmed the August 19, 2013 decision as modified.

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. Regardless of whether the asserted claim involves traumatic injury or occupational disease, an employee must satisfy this burden of proof.[3]

OWCP regulations, at 20 C.F.R. § 10.5(ee) define a traumatic injury as a condition of the body caused by a specific event or incident or series of events or incidents within a single workday or shift.[4] 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. 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. 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.[5]

OWCP cannot accept fact of injury if there are such inconsistencies in the evidence as to seriously question whether the specific event or incident occurred at the time, place, and in the

[3] *Gary J. Watling*, 52 ECAB 278 (2001).

[4] 20 C.F.R. § 10.5(ee); *Ellen L. Noble*, 55 ECAB 530 (2004).

[5] *Supra* note 3.

manner alleged, or whether the alleged injury was in the performance of duty,[6] and OWCP cannot 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 or her subsequent course of action.[7]

Causal relationship is a medical issue, and the medical evidence required to establish a causal relationship is rationalized medical evidence.[8] The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.[9] Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[10]

ANALYSIS

The Board finds that appellant did not establish fact of injury because inconsistencies in the evidence cast serious doubt as to whether the specific claimed event or incident occurred at the time, place, and in the manner alleged. Appellant has failed to establish a work-related June 11, 2013 incident causing injury to her lower back, as alleged.

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 cast doubt on an employee's statements in determining whether he or she has established his or her claim.[11]

In the case at hand, appellant did not file a claim for the alleged traumatic injury until June 26, 2013, more than two weeks after the claimed June 11, 2013 injury. She did not seek medical treatment until June 18, 2013. Appellant submitted no witness statements regarding the claimed June 11, 2013 lifting incident, and continued to work full duty until she saw Dr. Furman on June 19, 2013. She continued to work modified duty thereafter. The hearing representative advised appellant to provide the June 18, 2013 reports from Dr. Wolfe, but she did not do so. These factors cast doubt on her assertion that she injured her back while lifting a box on June 11, 2013.

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[6] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[7] *See Joseph H. Surgener*, 42 ECAB 541 (1991).

[8] *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

[9] *Leslie C. Moore*, 52 ECAB 132 (2000).

[10] *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

[11] *See Constance G. Patterson*, 41 ECAB 206 (1989).

In a June 20, 2013 statement, appellant maintained that on June 11, 2013 she noticed soreness, tightening, and stiffness in her lower back when she picked up a box and moved it. She stated that she was beginning her menstrual cycle, but that the pain was more severe than usual, and when her cycle ended on June 18, 2013 she became concerned because the back pain was increasing in severity. Appellant then reported the injury to her supervisor.

The employing establishment controverted the claim. On June 20, 2013 Mr. Crook noted that appellant did not report the claimed June 11, 2013 incident to her supervisor until June 18, 2013. He related that she reported having experienced mild back pain on June 11, 2013, but continued to work, and that after she was diagnosed with a herniated disc, she was placed on restricted duty of no lifting over 10 pounds. Mr. Crook maintained that the injury might be considered a cumulative injury, and it would be more appropriate to file an occupational disease claim.

Appellant submitted a number of reports from Dr. Furman, an attending physiatrist, beginning on June 19, 2013, eight days after the claimed incident. Dr. Furman initially noted her report that back pain began on approximately June 11, 2013 but that she did not remember any specific event, and that her job entailed repetitive packing and lifting up to 40 pounds. On June 25, 2013 he advised that appellant's acute flare of pain was most likely from disc herniation and opined, "based on the history, it is work related." On an attending physician's report dated July 1, 2013, Dr. Furman reiterated his diagnosis and checked a form box "yes," indicating that the diagnosis was work related, stating that it was caused or aggravated by "repetitive lifting twisting activities." On August 26, 2013 he described appellant's report that she recalled lifting a box on June 11, 2013 and she felt that this could be what initially caused her pain. Dr. Furman stated that his comment denying trauma should not have been included in the treatment note. On September 6, 2013, he stated, "To clarify: Based on the history and mechanism, this is a work-related injury." On August 15, 2014 Dr. Furman stated that she "experienced pain after lifting a large box at work."

The Board finds that Dr. Furman's reports only recite the facts as told to him and do not offer any independent evidence that appellant injured her back when lifting a box on June 11, 2013. As described above, Dr. Furman either merely found that her condition was work related without further explanation, or that her condition was caused by repetitive lifting. He did not specifically describe the June 11, 2013 incident or explain how it caused appellant's condition in any of his reports.[12] Dr. Furman's opinion is, therefore, of limited probative value in supporting that the lifting incident occurred on that day.[13]

Given the absence of evidence regarding how appellant sustained the claimed injury, the Board finds that she did not meet her burden of proof to establish fact of injury. As appellant did

[12] As noted above, OWCP regulations define a traumatic injury as a condition of the body caused by a specific event or incident or series of events or incidents within a single workday or shift. 20 C.F.R. § 10.5(ee).

[13] *See D.T.*, Docket No. 15-143 (issued February 18, 2015).

not establish an incident as alleged, the Board need not discuss the probative value of the medical evidence submitted regarding causal relationship.[14]

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 to establish a work-related incident in the performance of duty on June 11, 2013.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 25, 2014 is affirmed.

Issued: November 20, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

[14] *Paul Foster*, 56 ECAB 208 (2004).