

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

M.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Nashville, TN, Employer**

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**Docket No. 16-0453
Issued: April 21, 2016**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 11, 2016 appellant, through counsel, filed a timely appeal of an October 6, 2015 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 to consider the merits of the case.

ISSUE

The issue is whether appellant met his burden of proof to establish a traumatic injury on February 18, 2015 in the performance of duty.

FACTUAL HISTORY

On May 5, 2015 appellant, then a 46-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that he slipped while descending steps and injured his shoulder on February 18, 2015. On the reverse of the claim form, appellant's supervisor initially indicated

¹ 5 U.S.C. § 8101 *et seq.*

that he received notice of appellant's injury on February 19, 2015. However, he struck through that date, and entered the date of May 7, 2015. Appellant's supervisor further indicated that appellant was injured in the performance of duty. The employing establishment also provided appellant with an authorization for examination or treatment (Form CA-16) on May 7, 2015.

In a letter dated May 7, 2015, the employing establishment requested that OWCP deny appellant's claim for continuation of pay (COP) on the basis that appellant failed to meet the 30-day written reporting requirement.

Dr. Charles Kaelin, an orthopedic surgeon, completed a form report on May 8, 2015 and diagnosed rotator cuff tear of the right shoulder. He reported that appellant fell on icy steps and tried to break his fall with his arm. Dr. Kaelin indicated with a checkmark "yes" that appellant's condition was caused or aggravated by his employment activity. He provided a treatment note dated May 7, 2015 and repeated the history of injury. Dr. Kaelin reported that appellant sought treatment from an emergency room due to right shoulder dislocation, and that his pain and loss of range of motion had progressed since the fall at work two months prior to the examination. He diagnosed rotator cuff tear and recommended a magnetic resonance imaging (MRI) scan.

Appellant underwent an MRI scan on May 11, 2015 which demonstrated severe supraspinatus and anterior infraspinatus tendinosis, moderate acromioclavicular degenerative changes, and minimal subacromial/subdeltoid bursitis. On May 15, 2015 Dr. Kaelin reviewed appellant's MRI scan and diagnosed right shoulder tendinosis. He provided work restrictions.

In a letter dated May 29, 2015, OWCP requested that appellant provide additional factual and medical evidence in support of his traumatic injury claim. It asked that appellant provide additional factual evidence supporting that his shoulder injury occurred at the time, place, and in the manner alleged. OWCP allowed 30 days for a response.

By letter dated June 20, 2015, appellant responded to OWCP's request for information. He indicated that he did not file a claim immediately following his incident because he thought his shoulder would heal. Appellant asserted that he informed his supervisor of his incident and shoulder injury the day after it occurred, but was instructed to work through the pain. He noted that there were no witnesses to the incident, but that he told a coworker that his shoulder was hurting the following day.

By decision dated June 29, 2015, OWCP denied appellant's traumatic injury claim on the basis that he failed to submit sufficient factual evidence to support that the incident occurred as alleged. It found that appellant failed to explain the delay in filing his claim, the immediate effects of the injury, and whether he had sustained any additional injuries before seeking medical treatment. OWCP noted that Dr. Kaelin's reports were not based on the history of injury described by appellant.

Appellant requested reconsideration and submitted additional evidence on July 7, 2015. In a note dated July 1, 2015, Dr. Kaelin disputed OWCP's interpretation of his reports. He alleged, "His date of injury is February 18, 2015. On the date of his visit of May 7, 2015, it was noted that he was making a delivery about two months ago. This in no way places the injury in

March and actually is two months and two weeks.” Dr. Kaelin attributed appellant’s condition to a fall on February 18, 2015.

Dr. Kaelin examined appellant on June 4, 2015 and diagnosed right shoulder tendinosis. He again reported that appellant’s pain occurred following a fall on icy steps when attempting to brace himself with his arm.

By decision dated October 6, 2015, OWCP denied modification of its prior decision. It found that Dr. Kaelin’s July 1, 2015 report was irrelevant as the issue in the case was whether appellant had established the factual aspect of his claim. OWCP requested a statement from appellant’s supervisor confirming that appellant reported the injury to him on February 19, 2015.

LEGAL PRECEDENT

OWCP defines 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. 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.”² 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.³ The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.

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. 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 subsequent course of action. 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. 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. 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.⁴

² 20 C.F.R. § 10.5(ee).

³ *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁴ *D.B.*, 58 ECAB 464, 466-67 (2007). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.3 (August 2012).

ANALYSIS

The Board finds this case not in posture for a decision.

Appellant alleged that he injured his right shoulder on February 18, 2015 when he slipped while descending steps. On the reverse of the form, appellant's supervisor initially indicated that he received notice of appellant's injury on February 19, 2015 in keeping with appellant's statement. He later redacted this date. Furthermore, while the employing establishment controverted appellant's claim for continuation of pay, on the basis that he had not provided written notice within 30 days, appellant's supervisor supported that appellant's injury occurred in the performance of duty.

OWCP denied appellant's claim on the basis that he failed to provide sufficient factual evidence to substantiate that his employment incident occurred as alleged. In its October 6, 2015 decision, OWCP specifically requested a statement from appellant's supervisor supporting that appellant had informed him of the February 18, 2015 employment incident on February 19, 2015. Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence particularly when such evidence is of the character normally obtained from the employing establishment or other government source.⁵ The Board has stated that once the OWCP has begun investigation of a claim, it must pursue the evidence as far as reasonably possible. OWCP should undertake additional development of the factual evidence to obtain the requested statement from appellant's supervisor confirming or denying knowledge of appellant's employment incident of February 18, 2015 on February 19, 2015 as reported by appellant and as initially listed on the reverse of appellant's Form CA-1. After this and such other development as OWCP deems necessary it should issue a *de novo* decision.

The Board further notes that the record contains a Form CA-16 dated May 7, 2015. If an employing establishment properly executes a Form CA-16, which authorizes medical treatment as a result of an employee's claim for an employment-related injury, the Form CA-16 creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim.⁶ The record is silent as to whether OWCP paid for the cost of appellant's examination or treatment for the period noted on the form.

CONCLUSION

The Board finds that this case is not in posture for a decision and remands the case to OWCP for further development consistent with this opinion of the Board.

⁵ See *Richard Kendall*, 43 ECAB 790 (1992).

⁶ See *Tracy P. Spillane*, 54 ECAB 608 (2003).

ORDER

IT IS HEREBY ORDERED THAT the October 6, 2015 decision of the Office of Workers' Compensation Programs is set aside and remanded for further development.

Issued: April 21, 2016
Washington, DC

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

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

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