United States Department of Labor
Employees' Compensation Appeals Board

J.K., Appellant	)	
and	)	**Docket No. 16-0255**
	)	**Issued: August 5, 2016**
DEPARTMENT OF THE ARMY, ANNISTON ARMY DEPOT, Anniston, AL, Employer	)	

Appearances:
Clarence Dortch, III, Esq., for the appellant[1]
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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 17, 2015 appellant, through counsel, filed a timely appeal from a May 27, 2015 decision of the Office of Workers' Compensation Programs (OWCP).[2] Pursuant to the Federal Employees' Compensation Act[3] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from May 27, 2015, the date of OWCP's last decision, was November 23, 2015. Since using November 24, 2015, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is November 17, 2015, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

[3] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met his burden of proof to establish a traumatic injury in the performance of duty on March 7, 2012, as alleged.

On appeal counsel argues that appellant was injured in the scope of his employment on February 9, 2009 and sustained another injury on March 7, 2012. He argues that appellant has been consistent with his allegations regarding the injury, and that the medical evidence supported his assertion that he was injured during his employment on March 7, 2012.

FACTUAL HISTORY

On June 27, 2012 appellant filed a traumatic injury claim (Form CA-1) alleging that on March 7, 2012, as he entered his workstation and as he stepped up into the turret of a M1 tank, he slipped, fell, and hurt himself. He listed the nature of the injury as "right side upper leg and thigh and pull a hernia." Appellant did not stop work. The employing establishment controverted the claim.

In support of his claim, appellant submitted a May 7, 2012 attending physician's report (Form CA-2a) wherein Dr. Gordon T. Connor, a Board-certified internist, noted that he first examined appellant on March 7, 2012. Dr. Connor diagnosed right inguinal hernia which needed repair and indicated that this condition began on the job in 2009.[4]

By letter dated July 16, 2012, OWCP informed appellant that further information was necessary to support his current claim and afforded him 30 days within which to submit this information.

Appellant submitted a March 30, 2010 progress note wherein Dr. Jarod E. Speer, a Board-certified family practitioner, noted that appellant suffered from asthma, hypertension, limb extremity pain, and unspecified chest pain.

OWCP also received a March 7, 2012 report wherein Dr. Connor indicated that appellant complained of right side pain for two days. Dr. Connor diagnosed abdominal pain, unilateral inguinal hernia, and allergic rhinitis pollen. Appellant also submitted a page from a May 7, 2012 report by Dr. Connor. The history portion of the report is complete, but it does note that appellant performed heavy lifting on the job from 2005 through 2011 and lists that the diagnosis is unilateral inguinal hernia.

In a supplemental statement dated July 25, 2012, appellant related that he reported the incident to his supervisor on the day it occurred and he was sent to the clinic. He noted that after the incident he started to hurt and have pains in his leg, back, and inner hip area on the right side of his body.

[4] The record substantiates that appellant filed a prior claim for a traumatic injury alleging that on February 11, 2009, while he was stepping into the turret of a M1 tank, he injured his right side, upper leg, and thigh. This claim was assigned by OWCP as File No. xxxxxx253. In a decision dated May 9, 2012, OWCP determined that although appellant established that the incident occurred as alleged and established a medical diagnosis, he failed to establish a causal relationship between the employment incident and the medical diagnosis. Accordingly, OWCP denied this claim.

In an August 8, 2012 letter controverting appellant's claim, the employing establishment questioned whether appellant actually experienced the event as alleged, noting that appellant's supervisor was not aware of any injury in March 2012 and that appellant informed him that his hernia was related to a 2009 injury. The employing establishment also stated that there was no medical evidence indicating that there was a new injury in 2012 which resulted in a hernia.

By decision dated August 24, 2012, OWCP denied appellant's claim, finding that the evidence did not support that the injury and/or event occurred as alleged.

On August 21, 2013 appellant, through counsel, requested reconsideration. Counsel argued that appellant was initially injured at work on February 9, 2009. He discussed the medical evidence and contended that appellant experienced right inguinal pain every day which was exacerbated with exertion at work, but that he worked full time through the pain.

Appellant continued to submit medical reports dated from March 7, 2012 through April 3, 2013 wherein Dr. Connor noted treatment for numerous conditions including asthma, hypertension, hyperlipidemia, chronic obstructive pulmonary disease (COPD), and lumbosacral spondylosis. These reports included a complete copy of the May 7, 2012 report wherein Dr. Connor indicated that appellant developed right groin pain on the job with some heavy lifting. Dr. Connor noted that appellant did a lot of heavy lifting on the job from 2005 until 2011. He indicated that appellant felt a knot down in his groin and subsequently went to the doctor and the hernia was diagnosed.

Dr. Connor referred appellant to Dr. Richard E. Abernathy, a Board-certified surgeon, for a consultation, and he submitted treatment notes from August 9, 2012 through May 3, 2013. In an August 9, 2012 report, Dr. Abernathy indicated that appellant came in for a consultation for inguinal bulge and pain, and noted that he hurt himself in 2009 at work and did not report it at that time. He listed his impression as right inguinal hernia, symptomatic; and pretty severe asthma. In a May 3, 2013 report, Dr. Abernathy noted that appellant returned after hernia repair in August of 2012. He noted that appellant had a typically well-healed hernia, and that he had had no good explanation for his pain.

Appellant submitted notes from Dr. Speer dated from October 9, 2010 through May 25, 2012, noting treatment for asthma, hypertension, fatigue, and hyperlipidemia.

Finally, appellant submitted a May 24, 2012 report by Dr. Josh C. Kilpatrick, a Board-certified internist, noting treatment of appellant for asthma, hypertension, hyperlipidemia, and COPD. Appellant also submitted diagnostic tests that did not address his employment history.

By decision dated December 19, 2013, OWCP denied modification of its prior decision. It found that appellant did not establish that the incident occurred as alleged due to inconsistencies in the evidence. OWCP noted that, since the facts surrounding appellant's case had not been established, the medical evidence was not considered.

By letter dated June 9, 2014, appellant's counsel argued that appellant initially sustained a right inguinal hernia in February 2009, that he exacerbated this injury in March 2012, and that the medical evidence established appellant's claim. He also submitted a December 11, 2013 report wherein Dr. Robert C. Cain, a Board-certified neurologist, assessed appellant with COPD, hypertension, shortness of breath, headaches, chest pain, abdominal discomfort, and cervical pain

that affected him on standing and sitting. In a May 19, 2014 note, Dr. Cain opined that appellant's constant pain and disability did not allow him to work efficiently and comfortably and probably was caused by the work injury he suffered in 2009. He indicated that appellant would not be able to work due to his shortness of breath and possible cardiac disease.

On May 27, 2015 OWCP denied modification of its earlier decision, finding that appellant did not establish that the incident occurred as alleged on March 7, 2012.

LEGAL PRECEDENT

An employee seeking benefits under FECA[5] has the burden of proof to establish 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.[6] 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.[7]

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.[8] 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.[9]

OWCP cannot accept fact of injury if there are such inconsistencies in the evidence as to seriously question whether the specific event or events occurred at the time, place, and in the manner alleged, or whether the alleged injury was in the performance of duty,[10] nor can it 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 subsequent course of action.[11] However, an employee's statement regarding the occurrence of

[5] *Id.*

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

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

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

[9] *Id.*

[10] *Pendleton, supra* note 6.

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

an employment incident is of great probative force and will stand unless refuted by strong or persuasive evidence.[12]

ANALYSIS

OWCP denied appellant's claim as he had not established that the claimed incident occurred at the time, place, and in the manner alleged. The Board finds that he has failed to establish a traumatic injury in the performance of duty on March 7, 2012, as the evidence is inconsistent as to his allegation that he sustained an injury on March 7, 2012.

Appellant alleged that on March 7, 2012, he fell and hurt himself while stepping up into the turret of a tank. However, he did not file a traumatic injury claim until June 27, 2012, over three and one-half months later. There were no witnesses to appellant's alleged accident. Although appellant indicated that he reported the incident to his supervisor on the same date, there is no evidence to support this assertion. Rather, the employing establishment, through its compensation specialist, indicated that appellant came to the compensation office in April 2012 and stated that he had a hernia and that the doctor told him that it was related to the alleged 2009 injury. The employing establishment noted that in July 2012 appellant filed a new traumatic injury claim addressing the same injury he had in 2009, but changed the date of injury to March 7, 2012.

Medical evidence submitted by appellant also does not provide timely support for the factual component of appellant's claim. Appellant saw Dr. Connor on March 7, 2012, complaining of right-sided pain for two days. Although Dr. Connor saw appellant on the very same date as the alleged incident, he did not indicate any new accident on that date in his report. In fact, he indicated that as of March 7, 2012, appellant had pain for two days. Dr. Kilpatrick saw appellant on May 24, 2012 and did not note the March 7, 2012 employment incident. The next physician to see appellant was Dr. Abernathy, and in an August 9, 2012 report, Dr. Abernathy indicated that appellant hurt himself in 2009 at work. Appellant did not see Dr. Cain until December 11, 2013, over 18 months after the alleged incident.

Although appellant's statement as to how the alleged incident occurred is entitled to great weight, there are too many inconsistencies surrounding his account of the incident of March 7, 2012. The fact that there were no witnesses, that his supervisor was not promptly notified of the incident, that he did not stop work, that appellant saw Dr. Connor on the date of the alleged incident yet Dr. Connor did not mention the incident, and that no doctor that he saw in close proximity to the date of the incident mentioned the employment incident, all cast doubt on appellant's assertions that he suffered an injury at work on March 7, 2012.

The Board also notes that appellant filed his claim on June 27, 2012, shortly after OWCP's May 9, 2012 decision denying appellant's similar claim in OWCP File No. xxxxxx253. Accordingly, the Board finds that the evidence contains such inconsistencies as to cast doubt on the validity of appellant's claim.[13]

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

[13] *See C.O.*, Docket No. 13-224 (issued June 12, 2013).

Therefore, the Board finds that appellant has not met his burden of proof to establish that he experienced an employment-related incident at the time, place, and in the manner alleged.[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 has not met his burden of proof to establish a traumatic injury in the performance of duty on March 7, 2012, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 27, 2015 is affirmed.

Issued: August 5, 2016
Washington, DC

Christopher J. Godfrey, 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

[14] Given that appellant did not establish an employment incident, further consideration of the medical evidence is unnecessary. *See Bonnie A. Contreras*, 57 ECAB 783, 789-90 (2003).