United States Department of Labor
Employees' Compensation Appeals Board

A.S., Appellant	)	
and	)	**Docket No. 16-0735**
	)	**Issued: November 3, 2016**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Mountain Home, TN, Employer	)	

Appearances:
Cecil Carter, for the appellant[1]
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 March 4, 2016 appellant, through his representative, filed a timely appeal of a November 4, 2015 merit decision and a February 4, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the 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] 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether appellant has established that he sustained an injury in the performance of duty on August 7, 2015, as alleged; and (2) whether OWCP abused its discretion in denying appellant's request for an oral hearing before an OWCP hearing representative as untimely filed.

FACTUAL HISTORY

On September 21, 2015 appellant, a 55-year-old food service worker, filed a claim for traumatic injury (Form CA-1), alleging that he was injured when a door crushed his left hand on August 7, 2015. He asserted on the claim form that his injury was caused by violence. Appellant stated that he was standing at the rear kitchen door, when B.C. burst through door, injuring his left hand. Appellant did not stop work.

By letter to appellant dated October 1, 2015, OWCP advised that it required additional factual and medical evidence to determine whether he was eligible for compensation benefits. It asked appellant to submit a comprehensive medical report from his treating physician describing his symptoms and a medical opinion explaining the cause of any diagnosed condition. Appellant was afforded 30 days to submit this additional evidence.

The employing establishment submitted a September 3, 2015 incident report from S.B., appellant's supervisor, received by OWCP on October 6, 2015. Supervisor S.B. noted that appellant had alleged that his hand was injured on August 7, 2015 when another employee violently forced a door open. Appellant had related to Supervisor S.B. that he attempted to move his hand out of the way of the door, because during this incident he was also attempting to prevent the air conditioning unit from falling and rolling into the wall. He also informed her that this incident was witnessed by several other employees, including the late shift supervisor. Supervisor S.B. asserted, however, that B.H., the night shift supervisor, stated that he did not know about the incident until he was asked about it three days later. Appellant reported that the incident to another supervisor, L.T., who was on duty the following day, and he was seen in the employing establishment emergency room. Supervisor S.B. noted that the emergency room progress note stated that appellant reported that a door closed on his left hand, but that the skin on his left hand was intact, with no signs of trauma, no tenderness of the left wrist or left arm, no digital swelling, and a negative x-ray.

In an October 6, 2015 memorandum, the employing establishment controverted the claim. It noted that, although appellant alleged that his injury was witnessed by several employees, employees who witnessed the August 7, 2015 incident contradicted his account of the incident. Management also asserted that no employee witnessed appellant having his hand hit or crushed by the door. In fact, a witness indicated that appellant was standing by the dishwasher, not the door, which was approximately 10 feet away.

In a September 23, 2015 report of contact, received by OWCP on October 19, 2015, appellant asserted that on August 7, 2015 B.C. violently entered the rear kitchen door by ramming his body and bursting through it using his entire body weight. Appellant advised that, at that time, he was standing at the back of door between the door and the air conditioning unit inside the kitchen. His left hand was injured as he attempted to move his hand out of the way of

the door, and he tried to stop the air conditioning unit from falling and rolling into the wall. He asserted that this was witnessed by several employees, including Supervisor B.H. Appellant reported that, although his left hand was swollen and painful for the remainder of his shift, he finished his duties and then visited the employing establishment's emergency department. He advised that he reported this incident to Supervisor L.T. the next day because Supervisor B.H. had not seemed concerned the night before.

In a September 25, 2015 fact-finding memorandum, received by OWCP on October 19, 2015, Supervisor S.B. described various accounts of the August 7, 2015 incident and summarized statements from appellant, Supervisor B.H., and three coworkers. She noted appellant's allegations as related in his September 23, 2015 report of contact. Supervisor S.B. referenced an August 20, 2015 witness statement from food-service worker We.B., who advised that on August 7, 2015 B.C. was trying to enter the door to the dish room, which was heavily obstructed. We.B. related that appellant was working in the dish room at this time and that B.C. attempted to tell him that the door was blocked. Appellant did not offer to clear the doorway, but instead yelled at B.C., who tried to move the items from the doorway as best he could from the outside. We.B. noted that this seemed to offend and anger appellant even more, causing him to shout louder and with more aggression.

Supervisor S.B. related that she had a telephone conversation with appellant on August 25, 2015. Appellant asked her to speak with coworker We.B., who was present when the August 7, 2015 incident occurred. Supervisor S.B. noted that although appellant advised in his initial report of contact that the events of August 7, 2015 were witnessed by several employees, including Supervisor B.H., only three other employees were aware of the events that occurred. She listed these employees as B.C., We.B. and Wa.B., none of whom witnessed appellant sustaining an injury. Supervisor S.B. further reported that when appellant was questioned on September 18, 2015, he stated that Supervisor B.H. did not witness the situation, but was aware of what had happened. Appellant stated that Wa.B. was named by appellant as the key witness, but Wa.B. never mentioned that We.B. was also present during the August 7, 2015 incident. Supervisor S.B. reiterated that We.B. witnessed the incident but had a different recollection of events than that of appellant, and did not observe appellant sustaining an injury.

Wa.B., the employee named by appellant as a corroborative witness, reported that he had no knowledge of any injury resulting from the events that occurred. He reported that he witnessed the events, but that he did not know that any injury had occurred that evening. Wa.B. stated that appellant told him about his injury the following Sunday or Monday, at which time appellant asked him to serve as a character witness. He stated that, although he and appellant were hollering at B.C. to hold up, he continued to push through the door. B.C. stated that he did make his way through the door that evening, but that he only used enough force to open the door. It was not excessive force, and that there was no violent intent. He further stated that appellant was standing by the dish machine, not by the door. B.C. had asked that someone clear the doorway, but nobody helped to do so.

Supervisor S.B. concluded that there was no evidence or witnesses to substantiate appellant's alleged injury and his account of the August 7, 2015 incident. She noted that no employees witnessed appellant having his hand hit or crushed by the door; We.B. indicated that when B.C. was attempting to enter through the door, appellant was by the dishwasher, not the door, which was approximately 10 feet away. Supervisor S.B. further asserted that there were

inconsistencies between appellant's original allegation and his subsequent statements, which were contradicted by employees who witnessed the August 7, 2015 incident.

In an August 7, 2015 report, received by OWCP on October 19, 2015, Dr. John L. Holland, an osteopath, advised that appellant had complaints of locking of his left long finger and right long finger. He noted that appellant was reluctant to make a full fist on the left side because he did not want to flex the long finger secondary to pain. Dr. Holland diagnosed bilateral long trigger fingers. He recommended that appellant undergo a neurologic evaluation to determine whether there was a compression neuropathy or whether this was just a peripheral neuropathy that not amenable to any surgical endeavors.

Dr. Holland noted that appellant stated that he was injured on August 7, 2015 when a door closed on his hand. He advised that, on examination, the skin on his left hand was intact, with no signs of trauma, no tenderness of the left wrist or left arm, and no digital swelling. Appellant underwent x-ray testing which showed no acute fractures.

In an October 8, 2015 report, Dr. John Holbrook, Board-certified in orthopedic surgery, diagnosed left trigger finger and advised appellant to minimize heavy gripping. He related that appellant injured his left hand when a door closed on it; appellant also reported having pain in his left elbow.

By decision dated November 4, 2015, OWCP denied appellant's claim, finding that he had failed to meet his burden of proof to establish fact of injury, as the evidence submitted did not establish that the incident occurred as alleged.

On January 6, 2016 OWCP received appellant's request for an oral hearing before an OWCP hearing representative, on a form dated November 7, 2015, and postmarked December 31, 2015.

In a decision dated February 1, 2016, OWCP denied appellant's request for a hearing as untimely filed pursuant to 5 U.S.C. § 8124. It informed him that his case had been considered in relation to the issues involved and that the request was further denied for the reason that the issue in this case could be addressed by requesting reconsideration from the district office and submitting evidence not previously considered.

LEGAL PRECEDENT-- ISSUE 1

An employee seeking benefits under FECA[3] 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 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.[4] These are the essential elements of each and every

[3] 5 U.S.C. § 8101 *et seq.*

[4] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[5]

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.[6] 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.[7]

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 manner alleged, or whether the alleged injury was in the performance of duty,[8] 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 her subsequent course of action.[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 cast doubt on an employee's statements in determining whether he or she has established his or her claim.[10]

ANALYSIS

The Board finds that appellant has not established that on August 7, 2015 a heavy door was rammed opened and closed or struck his left hand. Appellant asserted on his September 21, 2015 CA-1 form that on August 7, 2015 B.C. violently entered the rear kitchen door by ramming his body and bursting through the door using his entire body weight. In his September 23, 2015 report of contact, appellant alleged that he was standing at the back of door, between the door and the air conditioning unit inside the kitchen, and that his left hand was injured as he attempted to move his hand out of the way of the door, and as he tried to stop the air conditioning unit from falling and rolling into the wall.

Appellant asserted that this alleged incident was witnessed by several employees, including Supervisor B.H. Appellant's assertions, however, are contradicted by the evidence of record. In an August 25, 2015 telephone conversation with Supervisor S.B., appellant stated that Supervisor B.H., Wa.B., and other coworkers witnessed the August 7, 2015 incident. However,

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

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

[7] *Id.* For a definition of the term "injury," see 20 C.F.R. § 10.5(ee).

[8] *Elaine Pendleton*, *supra* note 4.

[9] *See Gene A. McCracken*, Docket No. 93-2227 (issued March 9, 1995); *Joseph H. Surgener*, 42 ECAB 541, 547 (1991).

[10] *See Constance G. Patterson*, 42 ECAB 206 (1989).

appellant subsequently stated on September 18, 2015 that Supervisor B.H. did not witness the event, but was only later made aware that it had happened. Appellant acknowledged that he did not report his alleged injury to Supervisor B.H. on the date of injury, but he noted reporting the incident to the supervisor on duty the next day.

Supervisor S.B. further indicated that the results of her fact finding revealed that We.B. witnessed the incident, but he had a different recollection of events than appellant, and did not observe appellant sustaining an injury. We.B. asserted that when B.C. was attempting to enter through the door, appellant was standing by the dishwasher, which was approximately 10 feet away from the door. This is consistent with B.C.'s assertion that appellant was standing by the dishwasher, not by the door he tried to open. B.C. also asserted that he only used enough force to open the door. Wa.B., the alleged corroborative witness, advised that he had no knowledge of any injury resulting from the August 7, 2015 incident and that appellant did not tell him about his alleged left hand injury until the following Sunday or Monday.

Therefore, there are discrepancies in the evidence of record. This contradictory evidence created an uncertainty as to the time, place, and in the manner in which appellant sustained his alleged left hand injury. Appellant asserted that he injured his left hand after being violently struck by a heavy door during the August 7, 2015 work incident, but this account is contradicted by witness statements that when the door opened appellant was standing by the dishwasher, not the door, which was approximately 10 feet away. In addition, appellant's credibility is further diminished because: (a) he initially alleged that several coworkers, including the night supervisor witnessed the August 7, 2015 incident, then subsequently admitted that Supervisor B.H. was not present during the incident; and (b) none of the employees who were present during the incident witnessed him having his hand hit or crushed by the door or sustaining an injury to his left hand.

Appellant failed to submit to OWCP a corroborating witness statement in response to its request. This casts additional doubt on appellant's assertion that he injured his left hand on August 7, 2015.[11] OWCP requested that appellant submit additional factual and medical evidence explaining how he sustained an injury to his left hand on the date in question. Appellant failed to submit such evidence. Therefore, given the inconsistencies in the evidence regarding how appellant sustained his injury, the Board finds that there is insufficient evidence to establish that he sustained an injury in the performance of duty, as alleged.[12]

For the reasons stated above the Board finds that appellant did not meet his burden of proof to establish fact of injury.

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.

[11] *See J.M.*, Docket No. 15-1964 (issued May 12, 2016).

[12] *See Mary Joan Coppolino*, 43 ECAB 988 (1992) (where the Board found that discrepancies and inconsistencies in appellant's statements describing the injury created serious doubts that the injury was sustained in the performance of duty).

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of FECA provides that a claimant for compensation not satisfied with a decision of the Secretary ... is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary.[13] Section 10.615 of the federal regulations implementing this section of FECA provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record.[14] The request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought.[15] A hearing is a review of an adverse decision by an OWCP hearing representative. Initially, the claimant can choose between two formats: an oral hearing or a review of the written record. In addition to the evidence of record, the claimant may submit new evidence to the hearing representative.[16] A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which the hearing is sought.[17] A claimant is not entitled to a hearing if the request is not made within 30 days of the date of the decision.[18] OWCP has discretion, however, to grant or deny a request that is made after this 30-day period.[19] In such a case, it will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons.[20]

While a claimant may not be entitled to a hearing as a matter of right if the request is untimely, OWCP has the discretionary authority to grant the request and must properly exercise such discretion.[21]

ANALYSIS -- ISSUE 2

On January 6, 2016 OWCP received appellant's request for an oral hearing before an OWCP hearing representative, which was dated November 7, 2015 and postmarked December 31, 2015. Because appellant did not request the hearing within 30 days of the November 4, 2015 decision, he was not entitled to a hearing as a matter of right under section 8124(b)(1).

[13] 5 U.S.C. § 8124(b)(1).

[14] 20 C.F.R. § 10.615.

[15] *Id.* at § 10.616(a).

[16] *Supra* note 14.

[17] *Supra* note 15.

[18] *James Smith*, 53 ECAB 188 (2001).

[19] 20 C.F.R. § 10.616(b).

[20] *Supra* note 18.

[21] *See id.; Cora L. Falcon*, 43 ECAB 915 (1992); *Mary B. Moss*; 40 ECAB 640 (1989); *Rudolph Bermann*, 26 ECAB 354 (1975).

OWCP considered whether to grant a discretionary review and correctly advised appellant that his case had been considered in relation to the issue involved and that the request was further denied for the reason that the issue in the case could be addressed by requesting reconsideration from the district office and submitting evidence not previously considered. An abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.[22] In this case, there is no evidence of record that OWCP abused its discretion by denying appellant's hearing request.[23] Accordingly, the Board finds that OWCP properly denied appellant's request for an oral hearing.

CONCLUSION

The Board finds that appellant has failed to establish that he sustained an injury in the performance of duty on August 7, 2015 as alleged. The Board also finds that OWCP did not abuse its discretion in denying appellant's request for an oral hearing.

ORDER

IT IS HEREBY ORDERED THAT the February 1, 2016 and November 4, 2015 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 3, 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

[22] *Samuel R. Johnson*, 51 ECAB 612 (2000).

[23] *M.F.*, Docket No. 16-0853 (issued July 18, 2016).