United States Department of Labor
Employees' Compensation Appeals Board

M.J., Appellant	)	
and	)	**Docket No. 17-1810**
	)	**Issued: August 3, 2018**
DEPARTMENT OF HEALTH & HUMAN SERVICES, NATIONAL INSTITUTES OF HEALTH, Bethesda, MD, Employer	)	

Appearances:
Terry Jenkins, 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 March 17, 2017 appellant, through his representative, filed a timely appeal from a December 22, 2016 merit decision of the Office of Workers' Compensation Programs[2] (OWCP).

[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 OWCP's December 22, 2016 decision was June 20, 2017. Since using August 17, 2017, 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 March 17, 2017, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

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.[4]

ISSUE

The issue is whether appellant has met his burden of proof to establish a traumatic injury in the performance of duty on February 1, 2016, as alleged.

FACTUAL HISTORY

On May 31, 2016 appellant, then a 60-year-old maintenance mechanic, filed a traumatic injury claim (Form CA-1) alleging that he sustained an injury at work on February 1, 2016. He asserted that he felt a sharp pain in the right side of his neck, right shoulder, and right arm after he lifted his arms above his head to remove a lens from a light fixture.[5] On the reverse side of the form, appellant's immediate supervisor indicated that appellant did not report the claimed February 1, 2016 injury to her until May 31, 2016. Appellant stopped work on February 1, 2016 and returned to work on February 29, 2016.

In a February 1, 2016 emergency treatment report, an attending physician assistant indicated that appellant reported pain and tingling in his neck and right shoulder which caused him to get little sleep the night before.[6] Appellant also complained of numbness in his right leg. The physician assistant diagnosed right arm radiculopathy with history of cervical disc herniation and right leg numbness "since this morning."

The findings of a February 1, 2016 MRI scan of appellant's cervical spine revealed multilevel cervical spondylosis resulting in central spinal and foraminal narrowing at C3-4, C5-6, and C6-7.[7]

Appellant submitted progress notes, dated between December 17, 2015 and March 1, 2016. In a February 1, 2016 entry, an attending physician assistant indicated that appellant's wife had called to request a medical report pertaining to appellant. On February 22, 2016 an attending nurse with an illegible signature noted that appellant visited the OMS clinic on February 1, 2016 complaining of right arm numbness due to an occupational injury incurred on June 3, 2015. In a

[3] 5 U.S.C. § 8101 *et seq.*

[4] Together with his appeal request, appellant submitted a timely request for oral argument pursuant to 20 C.F.R. § 501.5(b). After exercising its discretion, by order dated June 11, 2018, the Board denied the request as appellant's arguments on appeal could be adequately addressed in a decision based on a review of the case as submitted on the record. *Order Denying Request for Oral Argument*, Docket No. 17-1810 (issued June 11, 2018).

[5] Appellant characterized his claimed injury as "pain in my neck, shoulder, and arm." He asserted that a magnetic resonance imaging (MRI) scan showed a pinched nerve/cervical radiculopathy.

[6] Appellant visited a clinic of the Occupational Medical Service (OMS), a subdivision of the employing establishment.

[7] A June 9, 2016 MRI scan of appellant's cervical spine also showed degenerative changes at multiple cervical disc levels.

February 29, 2016 entry, Dr. Heike B. Bailin, an attending Board-certified family practitioner, diagnosed cervical degenerative joint disease and radiculopathy and advised that appellant could return to his regular work.[8]

In an undated note, Dr. Michelle Skinner, an attending osteopath Board-certified in family practice and osteopathic manipulative therapy, indicated that appellant had been seen in her office on February 5, 2016. She indicated, "Please excuse absence from [February 8, 2016] through [February 12, 2016]." In a February 25, 2016 note, Dr. Skinner advised that appellant could return to work on February 29, 2016. In a February 25, 2016 form report, she indicated that functional restrictions were not recommended.

In an April 22, 2016 narrative report, Dr. Skinner indicated that appellant presented with right upper extremity and neck pain and that he reported he had been struggling with continued pain and weakness secondary to his initial injury occurring at work in June 2015 with a flare up in January 2016. Appellant indicated that, when he was at work in June 2015, he experienced a sudden onset of a popping and burning sensation in his neck with pain extending into his left upper extremity and hand after he lifted about 100 pounds with his left hand and then turned to his right. Dr. Skinner discussed appellant's symptoms after June 2015 and noted that his pain/weakness eventually improved until January 2016 when he had a "recurrence of discomfort" after lifting something heavy at work. She indicated that appellant had gone back to work, but that he presently had neck pain that extended into his right upper extremity. Dr. Skinner advised that appellant was seen in the emergency room on June 9, 2015 and February 1, 2016 and that he also was examined on February 5 and 25, 2016. She diagnosed cervical degenerative disc disease with right upper extremity radicular neuropathy. Dr. Skinner found that it was likely the June 3, 2015 work incident aggravated an underlying degenerative cervical disc disease, thereby exacerbating the radicular nerve impingement of the right upper extremity with resultant continuing symptoms and loss of function.

Appellant also submitted physical therapy referral forms and reports of physical therapy sessions on June 18, July 13, and September 3, 2015 which listed June 3, 2015 as the date of injury.

In a November 10, 2016 development letter, OWCP advised appellant that the evidence of record was insufficient to establish that he actually experienced the February 1, 2016 employment incident alleged to have caused injury. It requested that appellant complete and return an attached questionnaire, which posed various questions regarding the claimed February 1, 2016 employment incident.[9] OWCP also requested that appellant submit a physician's opinion supported by a medical explanation as to how the reported employment incident caused or aggravated a medical condition. It afforded appellant 30 days to provide the requested information. Appellant did not

[8] In a June 8, 2016 form report, Dr. Bailin indicated that appellant needed functional restrictions from February 1, 2016 until a date to be determined, but she did not identify any specific functional restrictions.

[9] OWCP requested that appellant provide a detailed description of how the February 1, 2016 injury occurred. It asked him to comment on the fact that medical evidence in the case record noted that he was injured at work in June 2015 and had a flare up in January 2016, but did not mention the alleged February 1, 2016 employment incident.

respond nor submit any evidence in response to the November 10, 2016 letter within the allotted period.[10]

By decision dated December 22, 2016, OWCP denied appellant's claimed injury because he failed to establish the fact of injury. It determined that the evidence submitted was insufficient to establish that the implicated February 1, 2016 event occurred as he described. OWCP found that appellant failed to clarify the factual portion of his claim, specifically the fact that the medical evidence he submitted, including Dr. Skinner's April 22, 2016 report, indicated that he was injured in June 2015 and had a recurrence of discomfort in January 2016 after lifting something heavy at work.[11]

LEGAL PRECEDENT

An employee seeking benefits under FECA[12] has the burden of proof to establish 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.[13] These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[14]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established. There are two components involved in establishing the fact of injury. 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.[15] Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.[16]

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be

[10] On November 18, 2016 appellant spoke to an OWCP official *via* telephone and asserted that he had submitted medical evidence "under claim from June 2015."

[11] OWCP further found that appellant also failed to submit any medical evidence establishing that a diagnosed medical condition was causally related to the implicated work injury or event.

[12] *See supra* note 3.

[13] *C.S.*, Docket No. 08-1585 (issued March 3, 2009); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[14] *S.P.*, 59 ECAB 184 (2007); *Victor J. Woodhams*, 41 ECAB 345 (1989). A traumatic injury refers to injury caused by a specific event or incident or series of incidents occurring within a single workday or work shift whereas an occupational disease refers to an injury produced by employment factors which occur or are present over a period longer than a single workday or work shift. 20 C.F.R. §§ 10.5(q), (ee); *Brady L. Fowler*, 44 ECAB 343, 351 (1992).

[15] *Julie B. Hawkins*, 38 ECAB 393 (1987).

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

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 claimant.[17]

An employee who claims benefits under FECA 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.[18] 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 or her subsequent course of action.[19] 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.[20] 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.[21] 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.[22]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish a traumatic injury in the performance of duty on February 1, 2016, as alleged.

On May 31, 2016 appellant filed a traumatic injury claim alleging that he sustained injury at work on February 1, 2016. He asserted that he felt a sharp pain in the right side of his neck, right shoulder, and right arm after he lifted his arms above his head to remove a lens from a light fixture.

The Board finds that there are such inconsistencies in the evidence as to cast serious doubt upon the validity of appellant's claim that he sustained injury due to a February 1, 2016 employment incident, as alleged.[23] Although appellant claimed that a specific action at work caused injury on February 1, 2016, *i.e.*, lifting his arms above his head, a significant inconsistency is created by the fact that none of the contemporaneous medical evidence from the claimed February 1, 2016 injury contains any mention of such an injury. In fact, medical evidence

[17] *See I.J.*, 59 ECAB 408 (2008); *Donna Faye Cardwell*, 41 ECAB 730 (1990).

[18] *William Sircovitch*, 38 ECAB 756, 761 (1987); *John G. Schaberg*, 30 ECAB 389, 393 (1979).

[19] *Charles B. Ward*, 38 ECAB 667, 670-71 (1987); *Joseph Albert Fournier, Jr.*, 35 ECAB 1175, 1179 (1984).

[20] *Tia L. Love*, 40 ECAB 586, 590 (1989); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

[21] *Samuel J. Chiarella*, 38 ECAB 363, 366 (1987); *Henry W.B. Stanford*, 36 ECAB 160, 165 (1984).

[22] *Robert A. Gregory*, 40 ECAB 478, 483 (1989); *Thelma S. Buffington*, 34 ECAB 104, 109 (1982).

[23] *See supra* note 20.

submitted by appellant in connection with the present claim makes no mention of such an employment incident occurring on or about February 1, 2016. While appellant did visit an emergency room on February 1, 2016, the records from that visit do not mention any type of employment incident occurring on that date. In a February 1, 2016 report, an attending physician assistant indicated that appellant reported pain and tingling in his neck and right shoulder, which caused him to get little sleep the night before. The report does not mention any incident alleged to have triggered such symptoms.

The Board notes that some of the medical evidence suggests that appellant related his medical condition in early-2016 to incidents occurring prior to February 2016. For example, in a February 22, 2016 report, an attending nurse noted that appellant visited the clinic on February 1, 2016 complaining of right arm numbness due to an occupational injury incurred on June 3, 2015. In an April 22, 2016 report, Dr. Skinner indicated that appellant reported that, when he was at work in June 2015, he experienced a sudden onset of a popping sensation and burning sensation in his neck with pain extending into his left upper extremity and hand after he lifted about 100 pounds and that his medical condition improved until January 2016 when he had a "recurrence of discomfort" after lifting something heavy at work. The Board notes, however, that the question of whether appellant sustained work-related injuries in June 2015 or January 2016 is not the subject of the present appeal. Rather, the question currently before the Board is whether appellant sustained injury at work on February 1, 2016 due to lifting his arms above head to remove a lens from a light fixture.

Appellant was provided an opportunity to provide additional evidence/argument in support of his claim that he sustained an employment injury due to an incident at work on February 1, 2016. However, he failed to submit such explanatory evidence/argument within the allotted period.

The Board notes that the complete lack of reference in the medical evidence of record to the implicated February 1, 2016 employment incident, *i.e.*, appellant lifting his arms above his head, and the lack of any explanation by appellant for this inconsistency, represents strong and persuasive evidence which rebuts the presumption that a February 1, 2016 employment incident occurred as alleged.[24]

On appeal appellant argues that he submitted sufficient paperwork to establish the occurrence of a February 1, 2016 employment incident, as alleged. The Board has explained above why appellant did not submit sufficient evidence to meet his burden of proof to establish a February 1, 2016 employment incident. Therefore, appellant has failed to establish the fact of injury with respect to the claimed February 1, 2016 employment injury.[25]

[24] *See supra* note 22. *See also S.W.*, Docket No. 17-0282 (issued April 5, 2018) (claimant failed to establish fact of injury due to inconsistencies between his account of claimed injury when filing his claim and the accounts provided to medical providers).

[25] *See supra* note 13.

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 February 1, 2016, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the December 22, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 3, 2018
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