United States Department of Labor
Employees' Compensation Appeals Board

R.L., Appellant	)	
and	)	**Docket No. 17-1670**
	)	**Issued: December 14, 2018**
DEPARTMENT OF HOMELAND SECURITY, CUSTOMS & BORDER PROTECTION, Miami, FL, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 28, 2017 appellant filed a timely appeal from a June 27, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP).[1] Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[3]

[1] Together with his appeal request, appellant submitted a timely request for oral argument pursuant to 20 C.F.R. § 501.5(b). By order dated February 1, 2018, the Board exercised its discretion and 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. 17-1670 (issued February 1, 2018).

[2] 5 U.S.C. § 8101 *et seq.*

[3] The Board notes that following the June 27, 2017 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met his burden of proof to establish an injury on April 30, 2017, in the performance of duty, as alleged.

FACTUAL HISTORY

On May 5, 2017 appellant, then a 63-year-old customs and border protection officer, filed a traumatic injury claim (Form CA-1) alleging that, on April 30, 2017, he sustained a herniated disc "while loading foreign mail parcels onto a conveyor belt for x-raying." He stated that he bent over to lift a box that was particularly heavy and felt a bad pain in his lower back, which worsened over time. Appellant stopped work on May 4, 2017.

In an emergency room (ER) report dated May 3, 2017, Dr. Peter Aaron Oravitz, a Board-certified emergency medicine specialist, diagnosed lumbar stenosis, osteoarthritis of the spine with radiculopathy, lumbar region, and herniation of intervertebral disc of the lumbar spine.

In a note dated May 8, 2017, a healthcare provider released appellant to work, effective May 15, 2017.[4]

In a May 11, 2017 work capacity evaluation (Form OWCP-5c), Dr. Alex Bertot, a Board-certified orthopedic surgeon, diagnosed "severe lower back pain." He indicated that treatment had just been initiated, and a magnetic resonance imaging (MRI) scan was pending.

By development letter dated May 26, 2017, OWCP indicated that when appellant's claim was first received it appeared to be a minor injury that resulted in minimal or no lost time from work and, based on these criteria and because the employing establishment did not controvert continuation of pay or challenge the case, payment of a limited amount of medical expenses was administratively approved. It stated that it had reopened the claim for consideration because it received an indication that appellant had not returned to work in a full-time capacity. OWCP requested additional evidence and afforded appellant 30 days to respond to its inquiries.

In response, appellant submitted a May 25, 2017 note from Trevor Kolski, a physician assistant, who diagnosed lumbar herniated nucleus pulposus (HNP)/radiculitis.

A May 17, 2017 MRI scan of the lumbar spine revealed a central disc herniation and annular disc with caudally extruded disc at L2-3 in moderate spinal canal stenosis of 5 millimeter and traversing nerve root impingement.

A computerized tomography (CT) scan of the lumbar spine dated May 3, 2017 demonstrated multifactorial multilevel lumbar degenerative disc disease and facet arthropathy contributing to varying degrees of central canal and bi-foraminal stenosis.

In an ER report dated May 3, 2017, Dr. Oravitz noted that appellant presented "complaining of low back pain with intermittent bilateral loss of strength to the lower extremity while walking that caused him to fall." He found that appellant's examination was consistent with

[4] The signature of the healthcare provider is illegible.

some pain in the lower lumbar region. Appellant was hemodynamically stable and there was no neurological deficit noted.

In a June 6, 2017 narrative statement, appellant stated that he informed his supervisor directly after he tried to lift a heavier than usual box and injured his back. She asked whether he had any previous back problems and he responded no. Appellant stated that he left early that day, took a couple of days off work, and then went to the ER on May 3, 2017.

On May 11, 2017 Mr. Kolski found that appellant presented with progressive complaints of lower back pain radiating to both the right and left posterior thigh area. He diagnosed lumbago and indicated that appellant noted the onset of this pain beginning with a work-related activity on May 2, 2017. Mr. Kolski reported that appellant went to the ER the following day due to the significant increase in pain and numbness in the legs. Appellant also noted doing some heavy lifting at work.

In a May 25, 2017 report, Mr. Kolski reiterated his diagnosis of lumbago and indicated that appellant noted his symptoms started at the end of April with an injury date of April 30, 2017 when he was lifting heavy boxes at work. He opined that appellant had significant radicular issues and was "concerned for the extent of this disc herniation and nerve impingement that may be occurring." Mr. Kolski advised that appellant was totally disabled from work.

By decision dated June 27, 2017, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish that the injury and/or events occurred on April 30, 2017, as alleged.

LEGAL PRECEDENT

An employee seeking benefits under FECA 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[5] was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.[6]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether fact of injury has been established. A fact of injury determination is based on two elements. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time and place, and in the manner alleged. Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal

[5] 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. 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. 20 C.F.R. § 10.5(ee).

[6] *See T.H.*, 59 ECAB 388 (2008).

injury. An employee may establish that the employment incident occurred as alleged, but fail to show that his or her condition relates to the employment incident.[7]

An employee has the burden of proof to establish the occurrence of an injury 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, as alleged, but the employee's statements must be consistent with surrounding facts and circumstances and his or her subsequent course of action.[8] An employee has not met his or her burden of proof to establish 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 substantial doubt on an employee's statement in determining whether a *prima facie* case has been established. The employee has not met his or her burden of proof when there are such inconsistencies in the evidence as to cast serious doubt on the validity of the claim.[9] 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.[10]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish an injury on April 30, 2017, in the performance of duty, as alleged.[11]

On his claim form, appellant alleged that on April 30, 2017 he was loading foreign mail parcels onto a conveyor belt for x-raying when he bent over to lift a box that was particularly heavy and sustained a herniated disc. In his narrative statement, appellant stated that he left work early on April 30, 2017, took a couple of days off work, and then went to the ER on May 3, 2017.

In his May 3, 2017 report, Dr. Oravitz noted that appellant presented to the ER "complaining of low back pain with intermittent bilateral loss of strength to the lower extremity while walking that caused him to fall." On May 11, 2017 Mr. Kolski diagnosed lumbago and stated that appellant "note[d] the onset of this pain started with a work-related activity on [May 2, 2017]." He reported that appellant went to the ER the following day due to the significant increase in pain and numbness in the legs. In his May 25, 2017 report, Mr. Kolski reiterated his diagnosis

[7] *Id.*

[8] *See Gene A. McCracken*, Docket No. 93-2227 (issued March 9, 1995).

[9] *See R.E.*, Docket No. 17-0547 (issued November 13, 2018); *Betty J. Smith*, 54 ECAB 174 (2002).

[10] *See D.B.*, 58 ECAB 529 (2007).

[11] *See A.B.*, Docket No. 14-522 (issued November 9, 2015) (fact of incident not established where there was substantial inconsistency between the employee's account of events and the accounts of coworkers and supervisor with regard to the time and place of his alleged injury); *V.J.*, Docket No. 13-1460 (issued January 7, 2014) (claimed incident not established where employing establishment investigation revealed inconsistencies between the employee's account of the claimed incident and those of coworkers); *J.W.*, Docket No. 12-926 (issued October 1, 2012) (claimed incident not established where there were inconsistencies between the employee's statements and evidence at the scene of the alleged incident).

of lumbago and asserted that appellant noted his symptoms started at the end of April with an injury date of April 30, 2017 when he was lifting some heavy boxes at work. These inconsistencies cast serious doubt on the validity of appellant's claim. The evidence of record fails to establish specific details of the date, time, and location of the incident in question. For these reasons, the Board finds that the evidence of record is insufficient to establish that he was injured at work on April 30, 2017 in the performance of duty, as alleged.

Since appellant failed to establish the first component of fact of injury, it is unnecessary to discuss whether he submitted medical evidence sufficient to establish that a medical condition existed and whether the condition was causally related to the employment exposure alleged.[12] Thus, the Board finds that appellant has not met his burden of proof.

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 an injury on April 30, 2017, in the performance of duty, as alleged.

[12] *See Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997). As appellant failed to establish that the claimed event occurred as alleged, it is not necessary to discuss the probative value of medical evidence. *Id.*

ORDER

IT IS HEREBY ORDERED THAT the June 27, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 14, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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