

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

J.Q., Appellant)
and) Docket No. 16-1703
U.S. POSTAL SERVICE, NETWORK) Issued: March 5, 2018
DISTRIBUTION CENTER, Greensboro, NC,)
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

ALEC J. KOROMILAS, Alternate Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 23, 2016 appellant filed a timely appeal from a July 26, 2016 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 over the merits of the claim.

ISSUE

The issue is whether appellant met her burden of proof to establish an injury in the performance of duty on November 13, 2014, as alleged.

FACTUAL HISTORY

On December 23, 2015 appellant, then a 52-year-old mail processing clerk, filed a traumatic injury claim (Form CA-1) for a torn right rotator cuff that she allegedly sustained in

¹ 5 U.S.C. § 8101 *et seq.*

the performance of duty on the morning of November 13, 2014. She attributed her right shoulder injury to pushing, pulling, and lifting parcels and equipment. Appellant stopped work on November 24, 2015 to undergo right shoulder surgery.

In a December 23, 2015 employing establishment injury/medical condition notification form, appellant's supervisor, S.A., noted a November 13, 2014 date of injury and a history of injury as follows: "Doing regular duties (keying, processing mail, moving equipment/lifting parcels) start having pain in right shoulder down to fingers." The reported medical condition was right rotator cuff tear and appellant was noted to be totally disabled.

The employing establishment controverted appellant's entitlement to continuation of pay (COP) and argued there was no evidence that the injury occurred within a one-day period. It also noted that, although appellant claimed to have injured her shoulder at work on November 13, 2014, she had been receiving treatment for a right shoulder condition dating back to September 23, 2014. The employing establishment submitted a November 17, 2015 Family and Medical Leave Act (FMLA) request, which noted that appellant had been receiving treatment since September 23, 2014, and was scheduled for surgery on November 24, 2015. The FMLA request also noted that appellant received treatment on November 13, 2014 and on December 9, 2014 from Dr. Marcus V. Duda, a Board-certified orthopedic surgeon, diagnosed right shoulder impingement.

In a December 8, 2015 report, Dr. Duda diagnosed right rotator cuff tear, and noted that appellant was status post right shoulder arthroscopic debridement. He advised that appellant had been totally disabled since November 24, 2015, and that her condition was employment related.

In a January 4, 2016 claim development letter, OWCP informed appellant of the type of factual and medical evidence needed to support her claim, and requested that she submit such evidence within 30 days. In the attached factual questionnaire, it noted that it was unclear whether appellant sustained a traumatic injury or an occupational disease. OWCP asked that she clarify which type of injury she was claiming.

In a January 19, 2016 statement, appellant indicated that she previously had shoulder pain and arm numbness from lifting, reaching, pulling, pushing, and she became cautious of what she did. She noted that she first consulted Dr. Duda on March 19, 2015. In response to why it took her over a year to file her claim, appellant indicated that her condition had worsened. She explained that she medicated herself and took Aleve, Tylenol, and compresses hoping her pain would get better. Appellant also specified that she was claiming a traumatic injury.

OWCP received a January 4, 2016 attending physician's report (Form CA-20) from Dr. Duda. He did not specify a date of injury, but noted a history of shoulder pain and decreased range of motion. He diagnosed right rotator cuff tear, and noted that appellant had undergone surgery. Dr. Duda also indicated that he did not believe appellant's condition was caused or aggravated by an employment activity. He noted that he first examined appellant on November 13, 2014. Dr. Duda further indicated that appellant was totally disabled beginning November 24, 2015, and he anticipated a return to work on January 11, 2016. Additionally, he provided a January 4, 2016 duty status report (Form CA-17).

On January 12, 2016 appellant accepted a full-time, limited-duty assignment as a modified distribution clerk. She was restricted to lifting no more than 25 pounds.

In a January 14, 2016 report, Dr. Duda noted that appellant first presented with impingement symptoms of her shoulder on March 19, 2015. He advised that since then he saw her on June 18, October 15, November 10, and December 8, 2015, and January 4, 2016. Dr. Duda explained that on her initial presentation, she had impingement symptoms of her right shoulder. Appellant advised Dr. Duda that her symptoms started with work-related activities and she was given work restrictions for her shoulder. Dr. Duba noted that on June 18, 2015 appellant underwent a subacromial injection, which provided temporary relief. However, on October 15, 2015 he noted that she still had pain on testing and he recommended a magnetic resonance imaging (MRI) scan to rule out a rotator cuff tear. Dr. Duda treated appellant on November 10, 2015 and reviewed the MRI scan, which revealed subacromial bursitis with severe supraspinatus and infraspinatus tendinopathy, but no full-thickness rotator cuff tear. He explained that due to her pain with activities of daily living, appellant decided to proceed with arthroscopic intervention, which was performed on November 24, 2015. Dr. Duda indicated that arthroscopic findings revealed a rotator cuff tear, a superior labrum anterior to posterior (SLAP) lesion, and subacromial bursitis. Appellant underwent subacromial decompression, debridement of a rotator cuff tear, and debridement of a SLAP lesion. Dr. Duda explained that appellant underwent physical therapy for strengthening and stabilization and achieved full range of motion of her shoulder and was given a return to work note effective January 11, 2016, with a 25-pound lifting restriction. He related that appellant reported that her symptoms started from work-related activities, and he noted that her arthroscopic findings were consistent with rotator cuff pathology caused by work-related activities.

By decision dated February 5, 2016, OWCP found that appellant established fact of injury, but it denied her traumatic injury claim because the medical evidence was insufficient to establish that the claimed condition was causally related to the accepted November 13, 2014 work incident.

On February 24, 2016 appellant requested a review of the written record by an OWCP hearing representative.

By decision dated July 26, 2016, OWCP's hearing representative modified the February 5, 2016 decision to reflect that the claim was denied based on fact of injury, rather than causal relationship. He explained that there was no factual basis upon which to base the claim for either a traumatic injury or an occupational disease.

LEGAL PRECEDENT

A claimant seeking benefits under FECA² has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial

² *Id.*

evidence, including that an injury was sustained in the performance of duty as alleged, and that any specific condition or disability claimed is causally related to the employment injury.³

To determine if an employee sustained a traumatic 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 that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that allegedly occurred.⁴ The second component is whether the employment incident caused a personal injury.⁵

An alleged work incident does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty, but the employee's statement must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.⁶ A consistent history of the injury as reported on medical reports to the claimant's supervisor and on the notice of injury can also be evidence of the occurrence of the incident.⁷ 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.⁸ 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.⁹ However, an employee has not met his or her burden when there are inconsistencies in the evidence such as to cast serious doubt upon the validity of the claim.¹⁰

ANALYSIS

OWCP initially found that appellant established both the factual and medical components of fact of injury, but it denied her claim because she failed to establish causal relationship. The hearing representative subsequently affirmed the denial, but instead found that appellant had failed to establish that the employment incident occurred as alleged. Accordingly, the hearing representative modified the original decision to reflect that appellant had not established the factual component of fact of injury. The Board finds that appellant failed to meet her burden of proof to establish an injury in the performance of duty on November 13, 2014, as alleged.

³ 20 C.F.R. § 10.115(e), (f); see *Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996).

⁴ *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁵ *John J. Carlone*, 41 ECAB 354 (1989).

⁶ *Rex A. Lenk*, 35 ECAB 253, 255 (1983).

⁷ *Id.* at 255-56.

⁸ *Dorothy M. Kelsey*, 32 ECAB 998 (1981).

⁹ *Id.*

¹⁰ *Joseph A. Fournier*, 35 ECAB 1175 (1984).

Appellant claimed to have torn her right rotator cuff on November 13, 2014 at 10:30 a.m. while pushing, pulling, and lifting parcels and equipment in the performance of duty. She did not stop work at the time, and, in fact, waited more than a year before filing her claim. The record indicated that appellant had been treated for a right shoulder condition more than a month prior to the alleged November 13, 2014 injury.

In its January 4, 2016 claim development letter, OWCP asked that appellant provide witness statements and/or other documentation to support her claim, but she did not provide any additional documentation. Appellant merely noted that she experienced shoulder pain and forearm numbness “lifting, reaching, pulling, [and] pushing....” She failed to provide a detailed description of the alleged November 13, 2014 employment incident. Dr. Duda initially indicated in his January 4, 2016 attending physician’s report that appellant’s right shoulder condition was not employment related. And, while he later attributed appellant’s shoulder condition to unspecified work-related activities, he did not identify a particular date of injury, or even mention that he had previously examined appellant on September 23 and November 13, 2014.

The Board finds that appellant has not submitted sufficient evidence to establish that she actually experienced the alleged November 13, 2014 employment incident at the time, place, and in the manner alleged. Appellant’s description of the alleged injury is vague. And while she reportedly received medical attention on November 13, 2014, those records have not been submitted in support of her claim. Lastly, Dr. Duda’s contradictory statements regarding the cause of appellant’s right shoulder condition further undermine her allegation that she suffered a right rotator cuff tear in the performance of duty on November 13, 2014. As such, the Board finds that appellant failed to meet her burden of proof to establish her claim.¹¹

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 failed to meet her burden of proof to establish an injury in the performance of duty on November 13, 2014, as alleged.

¹¹ See V.F., 58 ECAB 321, 326-27 (2007).

ORDER

IT IS HEREBY ORDERED THAT the July 26, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 5, 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