United States Department of Labor
Employees' Compensation Appeals Board

R.E., Appellant	)	
and	)	**Docket No. 17-0547**
	)	**Issued: November 13, 2018**
U.S. POSTAL SERVICE, POST OFFICE, New York, NY, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 3, 2017 appellant filed a timely appeal from a July 28, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUE

The issue is whether appellant has met her burden of proof to establish a lumbar injury in the performance of duty on December 15, 2014.

[1] 5 U.S.C. § 8101 *et seq.*

[2] Appellant filed a timely request for oral argument in this case. By order dated May 3, 2018, the Board exercised its discretion and denied appellant's request as oral argument would further delay issuance of a Board decision and not serve a useful purpose. *Order Denying Request for Oral Argument*, Docket No. 17-0547 (issued May 3, 2018).

FACTUAL HISTORY

On February 25, 2015 appellant, then a 63-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that, on December 15, 2014, she sustained a left lower back injury as a result of standing and lifting relay bundles during a 13-hour overtime shift. She stopped work and first received medical care on December 16, 2014.[3]

In a December 22, 2014 note from Advantage Care Physicians, Renee Bloomfield, a nurse practitioner, reported that appellant was seen for lower back and knee pain. She noted chronic conditions, which started on September 1, 1993 after a lifting injury at work. Ms. Bloomfield reported that the condition had recently flared up in August 2014 and appellant was diagnosed with lumbar radiculopathy, herniated disc of the lumbar spine, and osteoarthritis of the knee. She reported that these conditions limited appellant's ability to stand, lift, push, and pull. Appellant was advised to return to work on restricted duty on December 26, 2014.

In support of her claim, appellant submitted numerous statements describing the December 15, 2014 incident, her employment duties, course of medical treatment, issues with her supervisors regarding the filing of her claim, and problems obtaining medical appointments and treatment for her injuries.

In a statement dated December 17, 2014, appellant explained that on December 15, 2014 the mail was delayed for her street assignment. A new employee was assigned to perform relays because three drivers were absent. As he was given many relays to complete, this caused the entire employing establishment to have to perform overtime. Appellant related that she was not informed that she would have to work overtime prior to departing to her street assignment. She noted that, because of her prior employment-related injuries, she would not voluntarily put her name on the desired overtime list.[4] Appellant reported that, on the date of the incident, the driver was five hours late, which resulted in her standing that entire time while waiting for the relay bags. The driver arrived after 7:00 p.m., while her regular tour schedule was from 7:30 a.m. to 4:00 p.m., normally receiving the relays between 12:00 p.m. and 1:00 p.m.

Appellant claimed that excessive standing and walking back and forth on December 15, 2014 caused her injury. She explained that she removed the first relay bag off the truck and completed her delivery. Upon returning to retrieve the second and third bags, appellant began walking with some discomfort and experienced acute pains in her lower left back and leg. She tried to contact the employing establishment, but no one would pick up the telephone. Appellant's pain was excruciating so she walked back to the employing establishment and informed the night carrier, L.C., about the excessive overtime and late driver. L.C. responded that some people like

[3] The present claim was assigned OWCP File No. xxxxxx619. The record also reflects a March 7, 2015 Form CA-1 claiming a March 3, 2015 traumatic injury when appellant turned and felt a buckle in her left knee. OWCP assigned that claim OWCP File No. xxxxxx491. On the reverse side of the claim form appellant reported that her supervisor forced her to file three different Form CA-1's for the same injury, which all derived from the December 15, 2014 incident. She reported that she did not want to file another Form CA-1, but that the employing establishment pressured her to change her December 17, 2014 statement. Rather than changing her statement, appellant provided an addendum describing the history of injury.

[4] The record before the Board does not contain information pertaining to appellant's prior work-related claims.

overtime. Appellant reported that her supervisor, W.P., was not on duty so she went to her desk to leave her a message regarding her injury. She could only find a notice of absence form 3971, which she left for W.P. stating that she had an injury and was seeking medical treatment. Appellant reported that she had an appointment with her treating physician the following day, but he only requested that she obtain a blood pressure reading. She attempted to get another appointment, but could not be seen until December 22, 2014. On December 17, 2014 appellant reported to work to file the required workers' compensation forms. Her supervisor, W.P., informed her that the Form 3971 was insufficient and requested that she submit a statement along with the workers' compensation forms provided. Appellant completed the workers' compensation forms, but could not find her supervisor to submit the paperwork. She explained that she attempted to give the forms to D.H., another supervisor, who instructed her to submit them to J.H., the area manager. Appellant reported that D.H. witnessed her slide the forms underneath J.H.'s locked office door. She then saw W.P. moments later and informed her that the forms were in J.H.'s office.

Appellant submitted medical reports, diagnostic reports, physical therapy notes, and nurse practitioner notes dated December 16, 2014 through September 10, 2015 documenting treatment for her lumbar injury.

In a January 17, 2015 duty status report (Form CA-17), Dr. Raghava Polavarapu, a Board-certified orthopedic surgeon, diagnosed lumbosacral strain and provided a history of lifting three bags at work on December 15, 2014. In a February 2, 2015 Form CA-17, he diagnosed lumbosacral sprain and noted a history of lifting bags of mail and excessive overtime.

Appellant also submitted medical reports dated March 12 through July 2, 2015 from Dr. Dorina Drukman, an osteopathic physician. In a March 12, 2015 medical report, Dr. Drukman reported that appellant presented with a history of recurrent lower back pain with progressive weakness in the left leg from December 15, 2014 while at work. She discussed appellant's history of a back injury stemming back to 1993 and reported that, due to aggravation of the lower back pain on December 15, 2014, she was unable to work until January 25, 2014. Dr. Drukman diagnosed lumbar radiculitis, history of lumbar disc herniation, and numbness in the left leg. She recommended a lumbar spine magnetic resonance imaging (MRI) scan and restricted appellant from returning to work.

In an April 14, 2015 attending physician's report (Form CA-17), Dr. Drukman reported that on December 15, 2014 appellant worked for 13 hours, primarily standing. The last four hours of the day were spent on her feet. While pulling a bag she experienced severe lower back pain radiating into the left leg. Dr. Drukman checked a box marked "yes" to a question of whether the diagnosed condition was caused or aggravated by the employment incident. She diagnosed lumbar radiculitis, history of lumbar disc herniation, and numbness in the left leg.

By letter dated March 18, 2015, the employing establishment controverted the claim. It reported that on December 13, 2014 appellant was overheard asking W.P. how to file a workers' compensation claim after appellant had been informed that it was a possibility that she may be required to work overtime in order to complete her assignment if no one else was available. The employing establishment indicated that she alleged a December 15, 2014 back injury after waiting for her relay duties for over an hour. However, appellant had indicated to W.P. that her inability to work overtime was due to a back injury which occurred 12 years prior. The employing

establishment contended that, on the date in question, she failed to notify the supervisor who was on duty, L.C., of the injury. The employing establishment noted that appellant was questioned and provided a statement dated December 17, 2014 alleging an occupational injury. Appellant also alleged to have informed her supervisor, D.H., of the incident. However, the employing establishment reported that D.H. was not advised of the incident and was off duty.

By development letter dated February 12, 2016, OWCP notified appellant that the evidence of record was insufficient to establish her claim. Appellant was advised of the medical and factual evidence needed and was asked to respond to a questionnaire. OWCP provided her with a copy of the employing establishment's letter of controversion for comment. The questionnaire advised appellant to describe in detail the employment-related activities which she believed contributed to her condition and all activities and hobbies outside of her federal employment. OWCP also requested that she specify whether she was claiming an occupational disease or traumatic injury based on the definitions provided. Appellant was afforded 30 days to submit the requested evidence. No response was received.

By decision dated March 16, 2016, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish that the December 15, 2014 employment incident occurred as alleged, noting that she failed to respond to the February 12, 2016 development letter.

On April 13, 2016 appellant requested an oral hearing before an OWCP hearing representative.

On March 28, 2016 appellant responded to OWCP's development questionnaire and confirmed that she was claiming a traumatic injury. She reported that her lumbar injury occurred on December 15, 2014 after the relay driver was 3 to 4 hours late, resulting in overtime and 13 hours of work that day. Appellant described the circumstances surrounding the employment incident, reporting that she was on East 61st Street and Third Avenue waiting for relays from approximately 3:00 p.m. to about 6:30 p.m. When the driver finally arrived, she placed the relays in her car and was able to complete the building delivery. When appellant tried to pull the last relay box and mailbags, appellant experienced lumbar pain and difficulty walking. She noted the approximate time of injury as 7:00 p.m. to 7:30 p.m. Appellant reported that she wanted to put her push cart in the relay box, but was unable to bend over to disassemble it. She reported that she returned to the employing establishment and notified the clerk at the desk what had happened. Appellant contested the allegations made by the employing establishment and described the circumstances surrounding her claim, notification of injury to her superiors, and filing of paper work. She reported that she came to work on December 17, 2014 to file an injury claim which resulted in her absence through January 25, 2015. Following her return to work, appellant's supervisor made her file a new Form CA-1 even though she had submitted the required paperwork on December 17, 2014.

Appellant stated that she never questioned how to file a workers' compensation claim prior to the date of the alleged employment incident "on December 13, 2014" as alleged by the employing establishment. She denied having a conversation with W.P. on December 13, 2014 regarding how to file a claim because she would never ask that question as she had previously filed Form CA-1's and knew how to file a workers' compensation claim. Appellant reported that on that date W.P. had questioned appellant's absence on December 3, 2014 and threatened to not pay

her because she believed that appellant took time off for her birthday. She reported no other injuries, either on or off duty, between the date of injury and the date she first reported the condition. Appellant further reported that she had a prior similar injury stemming back to 1993 as demonstrated by her diagnostic reports and described her course of medical treatment following the December 15, 2014 employment incident.

Appellant also submitted medical reports in support of her traumatic injury claim. In a March 11, 2016 report, Dr. Drukman diagnosed left L5 radiculopathy and lumbar and lumbosacral multilevel disc herniation with foraminal impingement and nerve root impingement. She reported that appellant had a history of multiple recurrent episodes of lower back pain precipitated by prolonged standing while at work from 1993, with flare ups in 1995, 1997, 1999, 2001, 2004, 2007, 2010, and 2013. Dr. Drukman explained that, during subsequent years, appellant's condition progressively worsened. In December 2014, appellant was asked to work overtime and after many hours of constant standing, she lifted a bag with mail and experienced severe pain in her lower back. She continued to work, but on December 15, 2014 while at work, her lower back pain became more severe. Dr. Drukman opined that appellant's preexisting condition of lumbar spine disc herniation was aggravated by the December 2014 employment incident.

A hearing was held on June 23, 2016 where appellant described the circumstances surrounding the alleged December 15, 2014 employment incident and the filing of her claim. Appellant reported that she filed her Form CA-1 on December 17, 2014 and was subsequently out of work because of her injury. When she returned to work in February 2015, the employing establishment made her complete a new form despite her protests, explaining why her claim was not filed within 30 days of the incident. Appellant reported a prior September 1, 1993 lumbar injury for a disc herniation. She noted that she had been restricted from working overtime due to that prior disc herniation and, although she had a prior disc herniation, her recent MRI scan revealed multiple disc herniations. OWCP's hearing representative held the case record open for 30 days for submission of additional evidence.

By decision dated July 28, 2016, OWCP's hearing representative affirmed the March 16, 2016 decision, finding that the evidence of record was insufficient to establish that the December 15, 2014 employment incident occurred, 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 filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed are causally related to the employment injury.[5] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[6]

[5] *Gary J. Watling*, 52 ECAB 278 (2001).

[6] *Michael E. Smith*, 50 ECAB 313 (1999).

In order to determine whether an employee actually sustained an 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, which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.[7] The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.

When an employee claims that he or she sustained an injury in the performance of duty, the employee must submit sufficient evidence to establish that he or she experienced a specific event, incident, or exposure occurring at the time, place, and in the manner alleged. He or she must also establish that such event, incident, or exposure caused an injury.[8] Once an employee establishes that he or she sustained an injury in the performance of duty, the employee has the burden of proof to establish that any subsequent medical condition or disability for work, for which he or she claims compensation is causally related to the accepted injury.[9]

To establish that an injury occurred as alleged, the injury need not be confirmed by eyewitnesses, but the employee's statements must be consistent with the surrounding facts and circumstances and her subsequent course of action. In determining whether a case has been established, such circumstances as late notification of injury, lack of confirmation of injury, and failure to obtain medical treatment may, if otherwise unexplained, cast substantial doubt on the employee's statements. The employee has not met her burden when there are such inconsistencies in the evidence as to cast serious doubt on the validity of the claim.[10]

ANALYSIS

The Board finds that this case is not in posture for decision.[11]

On her Form CA-1 appellant reported that on December 15, 2014 she sustained acute pain to the left lower back as a result of 13 hours of work that day, standing and lifting relay bundles. She subsequently provided a December 17, 2014 statement describing the circumstances surrounding the December 15, 2014 incident. On March 16, 2016 OWCP denied appellant's claim, noting that she failed to respond to OWCP's February 12, 2016 development letter and questionnaire.

The Board notes that, following OWCP's March 16, 2016 decision, appellant responded to OWCP's questionnaire. In narrative statements received on March 28, 2016, she provided greater

[7] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[8] *See generally, John J. Carlone*, 41 ECAB 354 (1989); *see also* 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. § 10.5(q) and (ee) (1999) (occupational disease or illness and traumatic injury defined).

[9] *Supra* note 6.

[10] *Betty J. Smith*, 54 ECAB 174 (2002).

[11] *M.H.*, Docket No. 16-0453 (issued April 21, 2016).

detail pertaining to the December 15, 2014 employment incident, the filing of her claim, and medical course of treatment. Appellant responded to each question posed and explained that she had a preexisting herniated disc from 1993 and did not sustain any other injury from the date of the December 15, 2014 employment incident to the filing of her claim. The Board notes that her Form CA-1, December 17, 2014 statement, and March 28, 2016 statement, as well as her June 23, 2016 testimony, provided a consistent account of the December 15, 2014 employment incident.[12]

In its March 18, 2015 challenge letter, the employing establishment controverted the claim for failing to immediately notify appellant's supervisor. The record reflects that her supervisor W.P. was not on duty on the evening of December 15, 2014 when the injury occurred. The employing establishment further acknowledged that appellant's other supervisor, D.H., was also not on duty at the time of the incident. Appellant explained that, following her injury on December 15, 2014, she complained to the night carrier L.C. about the excessive overtime. As W.P. was off duty, appellant left her a note stating that she was injured and seeking treatment. While her claim was not filed immediately following the December 15, 2014 employment incident, the employing establishment acknowledged that on December 17, 2014 she was questioned regarding the matter, requested a Form CA-2 to file an occupational disease claim, and submitted a statement claiming that she hurt her back on December 15, 2014. As appellant provided the employing establishment a statement describing the December 15, 2014 injury just two days following the employment incident, her delay in filing a Form CA-1 does not cast such inconsistencies as to doubt that the incident occurred at the time, place, and in the manner alleged.[13] Furthermore, while the employing establishment controverted the claim for failing to immediately notify her supervisor, there is no requirement that a claim be filed on the date of injury.[14] In cases of injury on or after September 7, 1974, section 8122(a) of FECA provides that an original claim for compensation for disability or death must be filed within three years after the injury or death.[15]

The employing establishment also asserted that on December 13, 2014 appellant was overheard asking Supervisor W.P. how to file a workers' compensation claim because her back hurt and she could not work overtime. It alleged that this conversation occurred after W.P. informed appellant that it was a possibility that she may be required to work overtime in order to complete her assignment if no one else was available. In her March 18, 2016 narrative statement, appellant denied ever making such a statement as she already knew how to file a workers' compensation claim, having previously filed numerous Form CA-1's. She acknowledged a conversation with W.P. who questioned her regarding her absence on December 3, 2014 because she believed that her time off work was for her birthday.

[12] *C.f. Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997).

[13] *A.J.*, Docket No. 12-0548 (issued November 16, 2012).

[14] *J.S.*, Docket No. 15-1618 (issued March 7, 2016).

[15] 5 U.S.C. § 8122(a); section 10.100(b) of OWCP regulations also provides that for injuries sustained on or after September 7, 1974, a notice of injury must be filed within three years of the injury. 20 C.F.R. § 10.100(b). *See also A.D.*, Docket No. 15-0732 (issued September 29, 2015).

In *N.H.*,[16] OWCP denied a June 3, 2009 traumatic injury claim for failing to establish fact of injury due to conflicting factual evidence surrounding appellant's left knee injury when he allegedly slipped on wet grass while delivering mail. A supervisor reported that appellant informed him that he injured himself in a baseball slide. A postmaster also declared that appellant advised him that he injured himself playing baseball the night before. A different supervisor reported that he spoke to appellant on June 3, 2009 following the injury who informed him that everything was okay. The Board reversed OWCP's decision, finding that the evidence of record was sufficient to establish that the June 3, 2009 incident occurred at the time, place, and in the manner alleged. The Board explained that appellant denied having made such statements or injuring himself while playing baseball. N.H. sought medical treatment within three days of the June 3, 2009 employment incident, the June 6, 2009 emergency room report provided a history of injury generally consistent with his account of events: that appellant slipped on wet grass while delivering mail three days prior, and the record contained no contemporaneous factual evidence to establish that the claimed incident did not occur as alleged.[17] The Board found that, under the circumstances of the case, appellant's allegations were not refuted by strong or persuasive evidence.[18]

Similarly, in this instance, the Board finds that the allegations made by the employing establishment does not render the claim factually deficient.[19] Appellant denied making the statement alleged by the employing establishment and provided further explanation as to the conversation held with W.P. on December 13, 2014. 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.[20] Despite appellant's delay in notifying her supervisor on the date of injury, appellant sought medical treatment just one day following the employment incident as evidenced by Ms. Bloomfield's December 16, 2014 report. She submitted a narrative statement to the employing establishment just two days following the incident on December 17, 2014 describing the work-related injury. Furthermore, the medical evidence of record also provides a history of injury generally consistent with appellant's account of events. Dr. Polavarapu's CA-17 forms described the December 15, 2014 employment incident, noting history of lifting three bags at work and excessive overtime requiring 13 hours of work that day. Dr. Drukman's reports also discussed the December 15, 2014 employment incident, noting that appellant stood during 13 hours at work and sustained her injury while pulling a bag towards the end of her shift. Given the above, the Board finds that her allegations were not refuted by strong

[16] Docket No. 10-1434 (issued January 24, 2011).

[17] *See Thelma Rogers*, 42 ECAB 866 (1991).

[18] *Supra* note 16.

[19] *Id.*

[20] *Caroline Thomas*, 51 ECAB 451 (2000).

or persuasive evidence.[21] Appellant has alleged with specificity that the incident occurred at the time, place, and in the manner alleged.[22]

The Board notes that OWCP emphasized the medical reports documenting a preexisting lumbar injury as support for failing to establish the factual portion of appellant's claim. However, whether appellant's lumbar condition is work related is a medical question which must be addressed, and does not negate the possible occurrence of the December 15, 2014 employment incident. There is no requirement that the federal employment be the only cause of her injury. If work-related exposures caused, aggravated, or accelerated appellant's condition, she is entitled to compensation.[23]

The Board finds that appellant adequately described the circumstances of the December 15, 2014 employment incident. As such, the Board finds that the first component of fact of injury, the claimed incident, occurred as alleged.[24]

Given that appellant has established the December 15, 2014 employment incident, the question becomes whether this incident caused an injury.[25] Thus, the Board will set aside OWCP's July 28, 2016 decision and remand the case for further development of the medical evidence.[26] Following this and other such development as deemed necessary, OWCP shall issue a *de novo* final decision.

CONCLUSION

The Board finds that the case is not in posture for decision.

[21] *Supra* note 13.

[22] *Id.*

[23] *See Beth P. Chaput*, 37 ECAB 158, 161 (1985); *S.S.*, Docket No. 08-2386 (issued June 5, 2008).

[24] *James R. Flint*, Docket No. 05-0587 (issued June 10, 2005).

[25] *See Willie J. Clements*, 43 ECAB 244 (1991).

[26] *T.F.*, Docket No. 12-0439 (issued August 20, 2012).

ORDER

IT IS HEREBY ORDERED THAT the July 28, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion.

Issued: November 13, 2018
Washington, DC

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

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board