

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

M.T., Appellant	)	
	)	
and	)	Docket No. 17-1934
	)	Issued: September 19, 2018
U.S. POSTAL SERVICE, POST OFFICE,	)	
Portland, OR, Employer	)	
	)	

*Appearances:*  
John B. King, for the appellant<sup>1</sup>  
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 September 13, 2017 appellant, through her representative, filed a timely appeal from an April 28, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The record provided to the Board includes evidence received after OWCP issued its April 28, 2017 decision. The Board's jurisdiction is limited to the evidence that was before OWCP at the time of its final decision. Therefore, the Board is precluded from reviewing this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

## ISSUE

The issue is whether appellant has met her burden of proof to establish a traumatic injury in the performance of duty on April 19, 2016, as alleged.

## FACTUAL HISTORY

On May 9, 2016 appellant, then a 53-year-old custodian, filed a traumatic injury claim (Form CA-1) alleging that on April 19, 2016 she sustained an injury when she lifted heavy garbage bags and threw away garbage in a new hamper. She claimed injury to her right arm, shoulder, wrist, and back. Appellant did not stop work. On May 18, 2016 she formally accepted a modified assignment, which had become effective May 10, 2016.

In her May 9, 2016 supplemental statement, appellant indicated that, on April 19, 2016, she pushed a new hamper, which was full of garbage bags, to the North truck dock to throw out the garbage. The last garbage bags were very heavy and, when she tried to lift one, the weight was overwhelming, causing injury to her arm, shoulder, wrist, and back. Appellant indicated that another employee helped her lift the heavy bag. She also noted that she requested Supervisor K.S. to determine how heavy the bags were. Appellant stated that she did not report the incident at the time because she thought it was a minor injury.

A May 9, 2016 accident report form indicated that, on April 19, 2016 appellant was emptying a hamper of trash/garbage at the North truck dock. While lifting the bags from the bottom of the hamper, she felt pain in her arm, shoulder, wrist, and back. The report noted that the cause/circumstances of the accident were lifting heavy garbage bags from/to a higher level.

In a May 9, 2016 work status report, Dr. Samuel I. Wesmann, a Board-certified internist, placed appellant on modified work activity from May 9 through June 20, 2016.<sup>4</sup>

In a May 9, 2016 statement, R.C., a coworker, indicated that conversations she had with appellant between May 2 and 8, 2016 pertained to appellant's back and shoulders hurting due to wearing the vacuum for several hours at a time.

By development letter dated May 24, 2016, OWCP informed appellant that the evidence of record was insufficient to establish her claim. It advised appellant of the medical and factual evidence needed, including a physician's reasoned opinion as to whether and how the claimed injury event had caused or contributed to a diagnosed condition. OWCP also enclosed a questionnaire and requested that she provide a more detailed description of the event as well as any witness statements she had regarding the event. It afforded appellant 30 days to submit the necessary evidence.

In a June 14, 2016 statement, appellant advised that on April 19, 2016 she was pushing one of the new hampers, called an "Elephant," to the North truck dock to empty trash. As she was emptying the "Elephant," she had to reach into it to get the final bags that were at the bottom,

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<sup>4</sup> Limitations were noted for walking, and lifting/carrying/pushing/pulling. Appellant was advised not to climb stairs, climb ladders, or use scaffolds/work at height.

which were heavier. As appellant lifted the bag out of the hamper to turn to her left and throw it onto the conveyor belt, the hamper tilted, and sprung back up to its upright position. She was caught off guard and dropped the bag back down into the hamper injuring her right wrist, arm, shoulder, and back. Appellant stated that Supervisor K.S., looked at the bags and saw how heavy they were. She also stated that another employee, E.A., helped her lift the bag out of the hamper and onto the conveyor belt to finish the job. Appellant stated that she used the affected areas every day before she saw her physician. She indicated that she had used heating pads, ice gel, and Aleve every day to reduce the pain. Appellant also denied any other injury between the claimed injury and when she first reported it to her supervisor.

In a June 24, 2016 statement, E.A. indicated that, on April 19, 2016, he was working when appellant injured her shoulder at the trash dump site while attempting to lift a garbage bag out of the trash totes. He further indicated that the bag was so heavy, that it took “another coworker” to help him to lift it. They then went to Supervisor K.S. to explain how appellant was injured.

In a June 15, 2016 work status report, Dr. Hannah E. Edwards, Board-certified in family practice and occupational medicine, noted an April 19, 2016 date of injury. She diagnosed left shoulder muscle strain, right shoulder muscle strain, and right wrist sprain. Dr. Edwards placed appellant on modified activity from June 15 through July 7, 2016.<sup>5</sup>

By decision dated June 27, 2016, OWCP denied the claim. It found that the medical evidence of record was insufficient to establish a medical condition causally related to the accepted April 19, 2016 employment incident.

On July 10, 2016 appellant requested an oral hearing before an OWCP hearing representative.

In a June 14, 2016 report, Dr. Wesmann diagnosed neck pain, right wrist joint pain, and right knee joint pain. He indicated that the reason for the visit was bilateral shoulder and right wrist from an April 19, 2016 work injury in which appellant related lifting heavy bags of garbage and throwing them into the new hamper. Dr. Wesmann indicated that there were no acute findings. Appellant had full neck and shoulder range of motion, symmetric brachial reflexes, and symmetric grip strength. She had negative Tinel’s and Finklestein’s tests at the right wrist. Dr. Wesmann also reported that appellant’s knee pain was better and that she could work full duty based on knee examination and x-rays. He noted that because of her diffuse, often atypical pains, there may be a psychosomatic component to her pain.

In a June 15, 2016 report, Dr. Edwards reported that appellant was injured at work on April 19, 2016. Appellant described trying to lift a heavy bag out of a large deep hamper and was twisting and pulling because the bag was stuck in the hamper. She felt pain in her left shoulder during those efforts and needed a coworker to help complete the lift. At home, appellant also started feeling pain in the right wrist and right shoulder. In the course of seeking care, she also developed lower extremity pain, which was evaluated by her primary medical physician. Dr. Edwards indicated that appellant worked light duty for half the day and full duty the other half

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<sup>5</sup> Appellant was to avoid lifting over 10 pounds, avoid work above chest height, and avoid forceful or repeated push or pull motions for both the right and left arm.

of the day with difficulty. She provided an assessment of left shoulder muscle strain, right shoulder muscle strain, and right wrist sprain. Dr. Edwards indicated that appellant had bilateral shoulder impingement signs with reduced right shoulder range of motion. She noted that appellant described a mechanism of injury that would reasonably cause acute shoulder strain and wrist sprain injuries. Dr. Edwards concluded that appellant could return to work on June 15, 2016 with limitations. A duplicative copy of Dr. Edward's June 15, 2016 work status report was provided.

June 15, 2016 x-rays of appellant's bilateral shoulders and right wrist revealed no bony abnormality or significant degenerative changes. Small osteophytes were seen along the medial aspect of the humeral head of the left shoulder.

In follow-up reports dated June 15, July 7 and 20, and August 17, 2016, Dr. Edwards continued to diagnose left shoulder muscle strain, right shoulder muscle strain, and right wrist sprain and provide restrictions for modified duty. In the July 7, 2016 report, she noted that "workers' compensation" denied the claim because she did not provide medical rationale regarding the diagnoses. Dr. Edwards reported:

"[Appellant's] diagnoses are based on her symptoms, described mechanism of injury, and initial exam[ination] findings. [Appellant] described repeatedly pulling and twisting with her arms/shoulders to release a heavy bag. This strong pulling mechanism could reasonably have caused strain at the myotendinous junction of her rotator cuff tendons along with stretch/pull injury to the ligaments or her right wrist that would manifest on exam[ination] as tenderness and limited range of motion. The diagnoses I [ha]ve assigned are based on clinical impression. Further imaging with magnetic resonance imaging [(MRI) scan] could refine [appellant's] diagnosis."

In an August 27, 2016 report, Dr. Edwards noted that appellant had increased right shoulder pain since she was asked to do heavier work. Increased right shoulder pain with limited range of motion and impingement signs were noted on examination. Dr. Edwards requested a right shoulder MRI scan to evaluate for a rotator cuff tear.

A September 3, 2016 right shoulder MRI scan indicated rotator cuff tendinopathy with no tear observed.

In a September 28, 2016 report, Dr. Edwards diagnosed tendinosis of right shoulder, right shoulder muscle strain, left shoulder muscle strain, and right wrist sprain. She indicated that the right rotator cuff tendinopathy described on the MRI scan was not injury related, but may relate to preexisting conditions that were asymptomatic prior to her work injury involving the right shoulder strain. Dr. Edwards continued to place appellant on modified activity.

In a November 15, 2016 report, Dr. Edwards diagnosed appellant's right shoulder conditions as adhesive capsulitis and tendinitis. She continued to provide reports regarding appellant's right shoulder condition. Appellant's ongoing physical examinations with regard to the right wrist and left shoulder were reported as normal.

In a February 2, 2017 report, Amanda Smith, a certified physician assistant, reported that appellant presented with swelling on the volar radial surface of the right wrist, which she

contributed to lifting heavy hampers at work. She indicated that the x-rays of the right wrist revealed no acute or degenerative changes. An assessment of right wrist pain, possible volar ganglion cyst was provided. Ms. Smith noted that, while appellant was offered a new MRI scan and possible excision of the cyst, she opted for conservative care.

A telephonic hearing took place before an OWCP hearing representative on February 13, 2017. Appellant's representative stated that the new huge trash bins (*a.k.a.* Elephants) tip very easily. He testified that, on the date of injury, one of the bags appellant was trying to pull out was really heavy and, while she was trying to pull the bag out, the "Elephant" flipped up, hit her arm, and caused her a strain. Appellant's representative testified that she got help from E.A. and that E.A. told him that, when he walked up to help appellant, the "Elephant" looked like it had tipped up so that it could be dumped. Appellant testified that she did not stop work after the injury. Appellant's representative mentioned that she got hit by a door in a different spot after the accident, but stated that it was not part of this claim.

Following the hearing, additional medical reports from Dr. Edwards dated February 15 and March 29, 2017 were received pertaining to right shoulder joint pain and right wrist joint pain.

By decision dated April 28, 2017, an OWCP hearing representative affirmed the denial of the claim, but found that the factual portion of fact of injury had not been established. The hearing representative found that the evidence of record was contradictory and therefore insufficient to establish that the claimed incident occurred as alleged.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>6</sup> 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 of FECA, that an injury was sustained in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>7</sup>

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 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. Second, the employee must submit medical evidence to establish that the employment incident caused a personal injury.<sup>8</sup>

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

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<sup>6</sup> *Supra* note 2

<sup>7</sup> *Gary J. Watling*, 52 ECAB 357 (2001).

<sup>8</sup> *T.H.*, 59 ECAB 388 (2008).

statements must be consistent with surrounding facts and circumstances and his or her subsequent course of action.<sup>9</sup> 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.<sup>10</sup> 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 doubt on an employee's statements in determining whether a *prima facie* case has been established.<sup>11</sup> However, an employee's statement regarding the occurrence of an employment incident is of great probative force and will stand unless refuted by strong or persuasive evidence.<sup>12</sup>

### ANALYSIS

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

OWCP denied appellant's claim based on its finding that she had not established that the April 19, 2016 employment incident occurred as alleged. Appellant claimed injury to her arm, shoulder, wrist, and back when she lifted heavy garbage bags from a new hamper (*a.k.a* an "Elephant") at the North truck dock on April 19, 2016. She indicated that another employee helped her lift the heavy garbage bag out of the hamper and that a supervisor had looked at the garbage bags and saw how heavy they were. A coworker, E.A., indicated in his June 24, 2016 statement that on April 19, 2016 appellant injured her shoulder at the trash dump site while attempting to lift a garbage bag out of the trash totes. He indicated that the bag was heavy and that it took another coworker to help him lift it. E.A. also related that they (he and appellant) then went to K.S., a supervisor, to explain how appellant was injured.

An OWCP hearing representative found that the factual portion of fact of injury had not been established as the evidence of record was too contradictory to establish the occurrence of the alleged employment incident. Specifically, she noted that, in her first statement, appellant reported only lifting heavy bags, however, in her later statement, she indicated that the Elephant flipped up while she was lifting bags and she was caught off guard and dropped the bag back down in the hamper injuring her right wrist, arm, shoulder, and back. The hearing representative also noted that there were inconsistencies in the history of injury provided to the medical providers. In the first narrative report of record dated June 14, 2016, appellant had reported an April 2016 injury to her left shoulder while lifting heavy bags. However, on June 15, 2016 she described the injury as repeated pulling and twisting to lift a stuck garbage bag.

The Board finds that the evidence of record is sufficient to establish that on April 19, 2016 appellant lifted a heavy garbage bag out of a new hamper. Appellant provided a generally consistent history of lifting a heavy garbage bag to the employing establishment and OWCP. An

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

<sup>10</sup> See *K.B.*, Docket No. 15-1527 (issued March 15, 2016).

<sup>11</sup> *Linda S. Christian*, 46 ECAB 598 (1995).

<sup>12</sup> *Gregory J. Reser*, 57 ECAB 277 (2005).

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 and persuasive evidence.<sup>13</sup> The employing establishment does not dispute that appellant was lifting garbage bags while emptying a hamper of trash/garbage on April 19, 2016. Furthermore, E.A related that he and another coworker had helped lift the heavy garbage bag out of the hamper and that, subsequently, he and appellant had reported the mechanism of injury to Supervisor K.S. on the date of the injury. Under the circumstances of this case, the Board finds that her allegations have not been refuted by strong or persuasive evidence and that there are no inconsistencies sufficient to cast serious doubt on her version of the employment incident.<sup>14</sup> The minor variances in appellant's statements regarding the mechanism of injury are not significant enough to deny her claim based on the factual portion of fact of injury. Consequently, appellant has established the occurrence of the April 19, 2016 work incident involving lifting of heavy garbage bags.

As OWCP's hearing representative found that appellant had not established that the claimed incident occurred on April 19, 2016 as alleged, it did not consider the medical evidence.<sup>15</sup> The case will be remanded to OWCP for evaluation of the medical evidence to determine whether appellant sustained an injury or attendant disability due to the accepted April 19, 2016 work incident. After such further development as it deems necessary, it shall issue a *de novo* decision.

### **CONCLUSION**

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

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<sup>13</sup> See *Allen C. Hundley*, 53 ECAB 551 (2002).

<sup>14</sup> See *L.S.*, Docket No. 13-1742 (issued August 7, 2014); *M.H.*, 59 ECAB 461 (2008).

<sup>15</sup> While OWCP reviewed the medical evidence in terms of appellant's reported history of injury, it did not evaluate the evidence for its probative value in terms of causal relationship.

**ORDER**

**IT IS HEREBY ORDERED THAT** the April 28, 2017 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: September 19, 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