United States Department of Labor
Employees' Compensation Appeals Board

A.C., Appellant	)	
and	)	**Docket No. 18-1567**
	)	**Issued: April 9, 2019**
DEPARTMENT OF THE ARMY, U.S. ARMY TEST & EVALUATION COMMAND, White Sands Missile Range, NM, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On August 13, 2018 appellant filed a timely appeal from an April 25, 2018 merit and a July 17, 2018 nonmerit 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]

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that following the April 25, 2018 merit 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 additional evidence for the first time on appeal. *Id.*

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish an injury in the performance of duty on March 5, 2018, as alleged; and (2) whether OWCP properly denied appellant's request for a review of the written record as untimely filed, pursuant to 5 U.S.C. § 8124.

FACTUAL HISTORY

On March 13, 2018 appellant, then a 55-year-old office management assistant, filed a traumatic injury claim (Form CA-1) alleging that on March 5, 2018 she fell while in the performance of duty, injuring her tailbone and her right hip. The injury allegedly occurred at the mine site on the employing establishment's premises. Appellant stated that she was stepping out of a General Services Administration (GSA) truck holding on to the vehicle door, when a gust of wind pulled the door. She let go of the door and fell to the ground, landing on her buttocks. Appellant reportedly bruised her tailbone and right hip. She stopped work on March 6, 2018 and returned on March 7, 2018. On the reverse side of the claim form, the employing establishment noted that appellant's injury occurred in the performance of duty. It also responded "yes" to the question of whether its knowledge of the facts about the injury was in agreement with statements of the employee and/or witnesses.

In a March 13, 2018 statement, R.G. indicated that the GSA vehicle was parked on the side of the road on a slope leaning to the right. As appellant opened the door to exit the vehicle, wind caught the door and caused it to swing wide open. R.G. stated that as a result appellant missed the vehicle's running board, and fell hurting her lower back.

In a March 6, 2018 attending physician's report (Form CA-20), Dr. Sandra LaFon, Board-certified in public health and occupational medicine, described a history of injury of "fell out of a GSA 4x4 truck, landing in a sitting position on the ground." She indicated examination findings of muscle spasm and tender coccyx. Dr. LaFon diagnosed status post fall with dorsalgia. She responded "yes" to the question which asked if the diagnosed condition was due to injury.

Submitted to the record was a March 7, 2018 work restriction form report by an unknown provider indicating "no duty today."

A March 12, 2018 physical therapy referral form noted a diagnosis/chief complaint of lumbosacral pain, nerve compression. The healthcare provider's signature is illegible.

In a handwritten prescription note dated March 15, 2018, Dr. Jason Rosenberg, a Board-certified physiatrist, related that on March 8, 2018 appellant underwent a right trochanteric bursa injection for hip bursitis.

In a March 20, 2018 development letter, OWCP advised appellant that the evidence of record was insufficient to establish her claim. It further advised her of the factual and medical evidence necessary to establish her claim and also provided a questionnaire for completion. OWCP afforded appellant 30 days to provide the necessary information.

In a March 21, 2018 prescription pad note, Dr. Guillermo Hernandez, Jr., a family practitioner, reported "acute lumbosacral pain secondary to injury." He related that appellant's

pain radiated to her right hip and leg secondary to sciatica from nerve compression. Dr. Hernandez recommended physical therapy, two to three times per week for one month.

By decision dated April 25, 2018, OWCP denied appellant's traumatic injury claim. It found that she failed to establish that the March 5, 2018 incident occurred as alleged as she failed to respond to its March 20, 2018 factual questionnaire and the medical evidence submitted did not contain a valid diagnosis in connection with the claimed injury or event.

OWCP subsequently received additional factual information and medical evidence.

On June 21, 2018 OWCP's Branch of Hearings and Review received appellant's request for a review of the written record. The request was dated April 30, 2018 and postmarked June 12, 2018.

By decision dated July 17, 2018, OWCP's hearing representative denied appellant's request for a review of the written record. She determined that appellant was not entitled to a review as a matter of right because she did not file her request within 30 days of OWCP's April 25, 2018 decision. The hearing representative further exercised her discretion and denied appellant's hearing request, finding that the issue in the case could be equally well addressed by requesting reconsideration before OWCP and submitting evidence establishing that she sustained an injury in the performance of duty.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[3] 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 of FECA,[4] that an injury 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.[5] 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.[6]

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.[7] 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

[3] *Id.*

[4] *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

[5] *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[6] *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[7] *D.B.*, Docket No. 18-1348 (issued January 4, 2019); *T.H.*, 59 ECAB 388, 393-94 (2008).

allegedly occurred.[8] The second component is whether the employment incident caused a personal injury.[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] Moreover, 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 the surrounding facts and circumstances and his or her subsequent course of action.[11] 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.[12]

ANALYSIS -- ISSUE 1

The Board finds that appellant has met her burden of proof to establish that the March 5, 2018 employment incident occurred, as alleged.

On her claim form, appellant indicated that on March 5, 2018 she was stepping out of a GSA vehicle when a gust of wind caused the door she was holding to fly open and she fell to the ground, landing on her buttocks. R.G., a witness to the incident, provided a March 13, 2018 statement indicating that wind caused the door to swing wide open as appellant was exiting the vehicle. R.G. further stated that appellant missed the vehicle's running board and fell, hurting her lower back. On the reverse side of the claim form, the employing establishment indicated that appellant's injury occurred in the performance of duty. It also responded "yes" to the question of whether its knowledge of the facts about the injury was in agreement with statements of the employee and/or witnesses.

The Board finds that appellant's description on the Form CA-1 and the March 13, 2018 witness statement by R.G. is sufficient to establish that the March 5, 2018 employment incident occurred at the time, place, and in the manner alleged. Appellant provided a singular account of the mechanism of injury that has not been refuted by any evidence in the record.[13] The medical evidence of record also substantiated appellant's description of the March 5, 2018 incident. In a March 6, 2018 Form CA-20, Dr. LaFon reported a history of injury of "fell out of a GSA 4x4

[8] *D.S.*, Docket No. 17-1422 (issued November 9, 2017); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[9] *B.M.*, Docket No. 17-0796 (issued July 5, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

[10] *D.B.*, 58 ECAB 529 (2007); *Gregory J. Reser*, 57 ECAB 277 (2005).

[11] *Joseph H. Surgener*, 42 ECAB 541, 547 (1991); *Gene A. McCracken*, Docket No. 93-2227 (issued March 9, 1995).

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

[13] *See S.W.*, Docket No. 17-0261 (issued May 24, 2017) (the Board found that OWCP improperly determined that the alleged employment incident did not occur when appellant provided consistent accounts of the claimed incident and there was no evidence to refute her detailed description); *see also J.L.*, Docket No. 17-1712 (issued February 12, 2018).

truck." In addition, appellant's action surrounding the incident corroborate her description. She stopped work and sought medical treatment the next day. As noted above, a claimant's statement that an injury occurred at a given time, place, and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.[14] The Board finds, therefore, that appellant has established that she actually experienced the March 5, 2018 employment incident at the time, place, and in the manner alleged.

As appellant has established that the March 5, 2018 employment incident factually occurred, the question becomes whether this incident caused an injury.[15] The Board will, therefore, set aside OWCP's April 25 and July 17, 2018 decisions and remand the case for consideration of the medical evidence. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision addressing whether appellant has met her burden of proof to establish a diagnosed medical condition causally related to the accepted employment incident and any attendant disability.[16]

CONCLUSION

The Board finds that appellant has met her burden of proof to establish that the March 5, 2018 employment incident occurred in the performance of duty, as alleged. The case is not in posture for decision with regard to whether appellant has established an injury causally related to the accepted employment incident.

[14] *Supra* note 11.

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

[16] In light of the Board's holding in Issue 1, Issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the July 17 and April 25, 2018 decisions of the Office of Workers' Compensation Programs are set aside and the case is remanded for further action consistent with this decision.

Issued: April 9, 2019
Washington, DC

Patricia H. Fitzgerald, Deputy 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