United States Department of Labor
Employees' Compensation Appeals Board

J.C., Appellant	)	
and	)	**Docket No. 18-1803**
	)	**Issued: April 19, 2019**
CENTRAL INTELLIGENCE AGENCY, Chantilly, VA, 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 September 27, 2018 appellant filed a timely appeal from a July 27, 2018 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 traumatic injury on January 24, 2018 while in the performance of duty, as alleged.

[1] 5 U.S.C. § 8101 et seq.

[2] The Board notes that following the issuance of OWCP's July 27, 2018 decision and on appeal, appellant submitted additional evidence. However, section 501.2(c)(1) of 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.*

FACTUAL HISTORY

On January 29, 2018 appellant, then a 57-year-old special assistant, filed a traumatic injury claim (Form CA-1) alleging that at 3:45 p.m. on January 24, 2018 she developed pain and numbness in her lower back with radiculopathy, as well as a small bruise on her lower left shin, when she packed files and lifted boxes while cleaning a file room. On the reverse side of the claim form, appellant's supervisor, A.A., indicated that she was in the performance of duty when injured.

In an undated statement, A.A. wrote that she discussed appellant's restrictions of no heavy lifting, reaching, movement of heavy items, or standing for long periods with appellant. She indicated that she assured appellant that she would not be required to do anything that would cause her discomfort and that she would receive assistance with moving items during the project, which was expected to take multiple days. A.A. identified an individual who assisted appellant on at least one occasion. She also noted that she reminded appellant on the date of the alleged injury that she was not expected to move or carry anything that was heavy or difficult.

In a return to work note dated January 31, 2018, Dr. Alok Rustogi, a Board-certified internist, indicated that appellant was under his care for low back pain and radiculopathy. He noted that she was able to return to work on February 12, 2018 and should continue with spinal precautions, including no lifting, bending, twisting, pushing, or pulling. Dr. Rustogi also indicated that appellant should continue with physical therapy three times per week.

A workers' compensation summary report for a visit from January 25, 2018, noted that Dr. Khodaidad Basharmal, a Board-certified internist, treated appellant for sprain of ligament of lumbar spine. The report further noted light-duty work restrictions beginning January 26, 2018 with a full-duty release date of February 5, 2018.

In a development letter dated February 14, 2018, OWCP notified appellant that the evidence of record was insufficient to establish her claim. It advised her of the type of factual and medical evidence required and provided a questionnaire for her completion. OWCP afforded appellant 30 days to provide the necessary information.

On March 9, 2018 appellant responded to OWCP's questionnaire. She noted that A.A. advised her on the date of the alleged injury to "get help with the boxes." Appellant indicated that she sought help from the individual identified in A.A.'s statement and other colleagues, but the help she received was "sporadic at best."

In a March 8, 2018 statement, Dr. Rustogi detailed appellant's condition. He diagnosed radiculopathy of the lumbosacral region, which he indicated was causally related to unaccustomed heavy work of lifting and transferring heavy case files.

In a medical report dated March 14, 2018, Dr. Rae Davis, a Board-certified physical medicine and rehabilitation specialist, discussed an evaluation for comprehensive pain care.

By decision dated March 20, 2018, OWCP denied appellant's claim, finding that she had not established that the injury or events occurred as she described. It explained that the facts surrounding the injury were unclear as the employing establishment's statement conveyed that appellant received assistance and was expected not to move heavy items.

OWCP subsequently received additional medical evidence, including medical records from Dr. Basharmal dated March 28, April 10, and May 12, 2018, where he discussed her history, x-ray examination results, and other observations.

On May 30, 2018 appellant requested reconsideration. With her request she provided a statement explaining that a colleague had assisted with lifting boxes on one occasion, but continuous assistance was not made available, and none of the individuals who were identified as available to assist provided help. She also submitted additional evidence, including a follow-up medical report from Dr. Rustogi dated April 16, 2018 and associated examination notes. Dr. Rustogi explained that appellant was injured while performing unaccustomed heavy lifting and transferring of heavy case files and boxes. He diagnosed radiculopathy and opined that it was caused directly as a result of the employment incident on January 24, 2018. Dr. Rustogi further noted that a magnetic resonance imaging scan performed April 3, 2018 revealed left lateral foraminal disc herniation at the L4-5 level.

Appellant also submitted a May 12, 2018 medical report from Dr. Martin Franco Tolentino, a Board-certified family practitioner. Following up on Dr. Basharmal's report, he noted that appellant continued to report pain and discomfort in her left leg, with some intermittent or occasional pain on the right side.

OWCP also received physical therapy notes dated January 30 to March 29, 2018; diagnostic test results dated November 11, 2016 and April 3, 2018; and e-mails from appellant, her supervisors, and other colleagues in planning the file room cleanout and identifying individuals who could assist appellant.

By decision dated July 27, 2018, OWCP denied modification of its March 20, 2018 decision, finding that the evidence of record was insufficient to establish that the 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 timely filed within the applicable time limitation period of FECA,[3] and 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.[4] These are the essential elements of each and every

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

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

compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[5]

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. 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.[6] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.[7]

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, but the employee's statements must be consistent with the surrounding facts and circumstances and her subsequent course of action. The employee has not met 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 serious doubt on an employee's statements in determining whether a *prima facie* case has been established. 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.[8]

ANALYSIS

The Board finds that appellant has met her burden of proof to establish that the January 24, 2018 employment incident occurred in the performance of duty, as alleged.

On the January 29, 2018 Form CA-1, appellant's supervisor, A.A., indicated that appellant was in the performance of duty when the injury was alleged to have occurred. While A.A. also indicated that she disagreed with the facts involving the injury as alleged by appellant, she did not dispute the fact that appellant was performing her assigned work duties when the employment incident allegedly occurred.

In the present case, the evidence of record supports that appellant's duties as a special assistant involved assisting in various office projects which were the tasks she alleged she was performing when injured on January 24, 2018.

[5] *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).

[6] *M.M.*, Docket No. 17-1522 (issued April 25, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

[7] *J.N.*, Docket No. 18-0675 (issued December 10, 2018); *E.H.*, Docket No. 16-1786 (issued January 30, 2017).

[8] *M.J.*, Docket No. 17-1810 (issued August 3, 2018); *S.P.*, Docket No. 10-0431 (issued November 24, 2010); *Mary Joan Coppolino*, 43 ECAB 988, 991 (1992).

The back injury appellant allegedly sustained on January 24, 2018 is also consistent with the facts and circumstances she set forth, her course of action following the alleged incident, and the medical evidence she submitted. The history of the work incident was confirmed by contemporaneous medical reports. She sought prompt medical care, first with Dr. Basharmal and later with Dr. Rustogi, her primary care physician, who diagnosed a pinched nerve in her lower back and attributed it to lifting and transferring heavy case files.

As noted above, to establish fact of injury the claimant must submit sufficient evidence to establish that she actually experienced the employment incident at the time, place, and in the manner alleged.[9] The Board finds that appellant has established that the January 24, 2018 employment incident occurred, as alleged. The employing establishment does not dispute that appellant was moving files and lifting boxes. Its statements to the effect that appellant declined to solicit help and defied instructions not to lift anything heavy may cast doubt on whether the injury arose within the scope of compensable work factors, but they do not discount appellant's contention that the employment incident occurred at the time, place, and in the manner alleged. 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.[10]

As there is no dispute that appellant experienced an employment incident in the performance of her duties on January 24, 2018, the Board finds that the first component of fact of injury, the claimed incident, occurred as alleged. Given that she has established that the January 24, 2018 employment incident occurred as alleged, the question becomes whether this incident caused an injury. As OWCP found that appellant had not established fact of injury, it did not evaluate the medical evidence. Thus, the Board will set aside OWCP's July 27, 2018 decision and remand the case for consideration of the medical evidence of record.[11] After this and any further development, as deemed necessary, OWCP shall issue a *de novo* decision on the issue of whether appellant has met her burden of proof to establish an employment-related injury.

CONCLUSION

The Board finds that appellant has met her burden of proof to establish that the January 24, 2018 employment incident occurred in the performance of duty, as alleged. The Board finds, however, that the case is not in posture for decision regarding whether she has established a traumatic injury causally related to the accepted January 24, 2018 employment incident.

[9] *L.F.*, Docket No. 17-0689 (issued May 9, 2018); *Julie B. Hawkins*, 38 ECAB 393 (1987).

[10] *See L.S.*, Docket No. 13-1742 (issued August 7, 2014); *M.H.*, 59 ECAB 461 (2008).

[11] *See C.M.*, Docket No. 17-0891 (issued October 20, 2017).

ORDER

IT IS HEREBY ORDERED THAT the July 27, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: April 19, 2019
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