

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

A.R., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
ALVIN C. YORK VETERANS)
ADMINISTRATION MEDICAL CENTER,)
Murfreesboro, TN, Employer)

Docket No. 18-0924
Issued: August 13, 2019

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

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge

JANICE B. ASKIN, Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 2, 2018 appellant filed a timely appeal from an October 12, 2017 merit decision and a January 26, 2018 nonmerit 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 this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the January 26, 2018 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 April 26, 2017, as alleged; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On August 9, 2017 appellant, then a 39-year-old supervisory police officer, filed a traumatic injury claim (Form CA-1) alleging that she injured her right shoulder on April 26, 2017 during a physical training course at the Federal Bureau of Investigation (FBI) National Academy while in the performance of duty. Appellant described her injury as a tear/strain of the right labrum – slap tendon. On the reverse side of the claim form, the employing establishment indicated that it first received notice of the injury on August 28, 2017. It also noted that appellant was away on travel at the time of the alleged injury and that she first received medical care on July 3, 2017. According to the employing establishment, appellant did not know when she was injured.

In a development letter dated September 7, 2017, OWCP acknowledged receipt of appellant's claim and informed her that additional evidence was needed to establish her claim. It specifically noted that the evidence was insufficient to establish that she actually experienced the employment incident as alleged and requested that she respond to an attached questionnaire in order to determine whether the alleged injury occurred in the performance of duty. OWCP also requested medical evidence in support of her claim. It afforded appellant 30 days to submit the requested information.

OWCP subsequently received an August 16, 2017 employing establishment incident report. Appellant described that she injured her right shoulder during attendance at the FBI National Academy in Quantico, VA as a result of "intense physical conditioning which was part of the course." She noted an initial onset of symptoms on approximately April 18, 2017, but related that extended pain did not start until April 25, 2017. Appellant explained that when the pain continued, she informed her physical training instructor and sought medical treatment at the onsite clinic at the FBI Academy. She was given pain medication which eased the pain enough that she was able to graduate from the training course on July 7, 2017. Appellant noted that she returned to the employing establishment in mid-June 2017 and informed the employee health unit that her right shoulder was still an issue.

In an undated statement, K.T, a health and fitness instructor at the FBI Academy, noted that on April 25, 2017 he received an e-mail from appellant stating that she had been experiencing a great deal of pain and had limited mobility in her right shoulder. Appellant asked K.T. if he knew of any techniques that would help her shoulder issues. She also informed him that she was limited in what she could perform physically. K.T. indicated he advised appellant to apply ice and limit activities that made her shoulder feel worse. He recalled that appellant limited herself physically throughout the remainder of the course.

In a September 22, 2017 statement, appellant responded to OWCP's questionnaire and explained that she had injured her right shoulder because of "intense physical conditioning" during a training course at the FBI National Academy in Quantico, VA. She described the exercise conditions as weighted sand bag pushes on a mat and while using dumbbell weights and punching

up and out in a standing position. Appellant noted that initial onset was about April 18, 2017, but she did not feel extended pain until April 25, 2017. She indicated that she informed the PT instructor of her concerns and was advised to rest. Appellant reported that on May 5, 2017 her condition had not improved so she went to see an occupational massage therapist. On May 9, 2017 she reported to the onsite clinic at the FBI National Academy and was prescribed pain medication. Appellant explained that when she returned to the employing establishment in mid-June 2017, she mentioned to a nurse at the occupational health unit that her shoulder was still an issue. She related that she did not seek immediate medical attention because of upcoming military duties, but upon returning she underwent a magnetic resonance imaging (MRI) scan on August 4, 2017. Appellant explained that she did not realize the severity of her condition until the MRI scan results.

In a May 8, 2017 occupational health unit note, Amanda O'Donnell, a certified nurse practitioner, related that appellant complained of intermittent pain to her right shoulder scapular region for approximately two weeks. She noted "no specific event or incident associated with onset," but reported that appellant believed several physical training activities had exacerbated the issue. Physical examination showed point tenderness to her right scapular region and intact range of motion and strength. Appellant was diagnosed with muscle strain.

In a July 3, 2017 handwritten occupational health unit treatment and work status note, a nurse practitioner with an illegible signature, related that appellant complained of right shoulder pain that began during training on April 26, 2017. Physical examination of appellant's right shoulder demonstrated pain when lifting above her shoulders. Appellant was authorized to return to limited duty. On August 4, 2017 the same nurse practitioner related that appellant had returned from training and still complained of right shoulder pain. She provided examination findings and indicated that a right shoulder MRI scan showed a labral tear. The nurse practitioner completed a work status note authorizing appellant to work limited duty.

A July 3, 2017 right shoulder x-ray report showed no evidence of fracture or dislocation, no lytic or sclerotic lesions, no bony destructive lesions, and no arthritic changes.

A July 17, 2017 right shoulder MRI scan revealed evidence of a labral tear, minimal acromioclavicular osteoarthritis, mild supraspinatus tendinopathy, possible subtle old Hill-Sachs deformity, and a possible loose body.

In an August 7, 2017 report, Dr. Charles Kaelin, a Board-certified orthopedic surgeon, noted that appellant worked in law enforcement, serving as military police and security, and had participated in training academies with the FBI. He explained that on April 26, 2017 she began to experience pain in her right shoulder. Upon physical examination of appellant's right shoulder, Dr. Kaelin observed weakness in abduction and external rotation. Labral provocation testing was positive. He diagnosed superior glenoid labrum lesion of the right shoulder and fracture of the upper end of the humerus. He completed a work status note indicating that appellant could work limited duty.

Appellant began to undergo physical therapy on August 10, 2017 and submitted several treatment notes and progress reports.

In an August 28, 2017 report, Dr. Kaelin indicated that a right shoulder MRI scan had confirmed that appellant had a labral tear as suspected. He related that she was still very

symptomatic and was unable to perform any kind of strenuous activity. Dr. Kaelin provided physical examination findings and diagnosed superior glenoid labrum lesion of the right shoulder. He completed a work status note authorizing appellant to work limited duty.

On August 28, 2017 the employing establishment offered appellant a limited-duty assignment as a supervisory police officer, effective August 28, 2017. Appellant accepted the job offer.

In an October 2, 2017 report, Dr. Kaelin indicated that he treated appellant for right shoulder pain and right labral tear. He reviewed appellant's history and conducted an examination. Dr. Kaelin noted positive labral symptoms, worse posteriorly, and marked pain on internal rotation and palpation of the posterior shoulder. He diagnosed superior glenoid labrum lesion of the right shoulder. Dr. Kaelin provided a work status note indicating that appellant work limited duty.

In an October 12, 2017 letter, J.V., the employing establishment's workers' compensation representative, indicated that on August 9, 2017 appellant filed a Form CA-1 for an alleged injury that occurred on "April 25, 2017" while she attended physical training at the FBI National Academy. She alleged that although appellant's initial claim noted a specific date and time of occurrence, her response to OWCP's questionnaire appeared to indicate that the condition developed over a period of time. J.V. pointed out that both appellant and the employing establishment's incident report noted that appellant's right shoulder pain began on April 18, 2017, but she did not experience "extended" pain until April 25, 2017. She reported that the employing establishment was challenging appellant's claim based on fact of injury as to how or when the injury occurred or condition developed.

By decision dated October 12, 2017, OWCP denied appellant's claim because she had not established that the April 26, 2017 incident occurred as alleged. It also determined that the evidence of record contained inconsistent details and discrepancies as to when the injury occurred. OWCP also noted that appellant had not submitted sufficient medical evidence to establish her claim. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

Additional medical evidence submitted after OWCP's decision included reports by Dr. Kaelin. In reports and work status notes dated October 30 to November 27, 2017, Dr. Kaelin related that appellant still had pain on basic activities of daily living, particularly overhead. He reviewed appellant's history and provided examination findings of limited range of motion and positive labral tearing of appellant's right shoulder. In a November 27, 2017 report, Dr. Kaelin indicated that he had confirmed with appellant a date of injury of April 26, 2017. He diagnosed superior glenoid labrum lesion of the right shoulder and advised that appellant continue working light duty.

In a letter dated November 27, 2017, Dr. Kaelin noted a date of injury of April 26, 2017. He reasoned that a date of injury in April 2017 was consistent with all clinical findings and medical information provided on the case. Dr. Kaelin reported: "I do not have one specific incident of the April 26, 2017, onset of pain. That does not make this inconsistent with her clinical findings." He reported that objective findings were consistent with a labrum tear. Dr. Kaelin opined that the training requirements and physical maneuvers described in the intense training were highly known

to cause injury such as labrum tears. He noted that Army medical journals supported the very high incidence of musculoskeletal injuries occurring during training in preparation for deployment.

In a December 18, 2017 report, Dr. Kaelin noted that appellant continued to have limitation with active and passive range of motion of her right shoulder and weakness with overhead abduction and external rotation. He reviewed appellant's history and provided examination findings. Dr. Kaelin diagnosed superior glenoid labrum lesion of the right shoulder and noted that appellant was awaiting approval for surgery. In a work status note, he indicated that appellant could work limited duty.

On January 9, 2018 appellant requested reconsideration.

In a January 8, 2018 report, Dr. Kaelin related that appellant still had marked symptomatology from her right shoulder labrum tear and that she was unresponsive to conservative treatment. He reviewed appellant's history and noted examination findings similar to his previous reports. Dr. Kaelin diagnosed superior glenoid labrum lesion of the right shoulder. In a work status note, he authorized appellant to work limited duty.

In a letter dated January 9, 2018, T.D., another workers' compensation representative for the employing establishment, reiterated that the employing establishment was challenging appellant's claim based on fact of injury as to how or when the injury occurred. She asserted that the lack of identification of specific employment factors causing or contributing to the injury raised questions as to whether it was an employment-related condition. T.D. contended that appellant's statement demonstrated that her condition developed over a period of time, and not as a result of a specific incident on "April 25, 2017." She further asserted that Dr. Kaelin failed to identify a specific incident which caused or contributed to appellant's shoulder condition.

By decision dated January 26, 2018, OWCP denied appellant's reconsideration request. It found that her reconsideration request neither raised substantive legal questions nor included new and relevant evidence sufficient to warrant further merit review of appellant's claim.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA³ has the burden of establishing 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

³ *Id.*

⁴ *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *Joe D. Cameron*, 41 ECAB 153 (1989).

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 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.⁷ First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time and place, and in the manner alleged.⁸ 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.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. Circumstances such 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 statement in determining whether a case has been established.¹²

ANALYSIS -- ISSUE 1

The Board finds that appellant has met her burden of proof to establish that the April 26, 2017 employment incident occurred, as alleged.

Appellant indicated on her claim form that she injured her right shoulder on April 26, 2017 during a physical training course at the FBI National Academy, noting the incident occurred at approximately 1:00 p.m. On the reverse side of the claim form the employing establishment noted it received notice of the injury on August 28, 2017, but acknowledged that she was "away on

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 *R.R.*, Docket No. 19-0048 (issued April 25, 2019); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁷ *R.B.*, Docket No. 17-2014 (issued February 14, 2019); *B.F.*, Docket No. 09-0060 (issued March 17, 2009) *Bonnie A. Contreras*, 57 ECAB 364 (2006).

⁸ *S.F.*, Docket No. 18-0296 (issued July 26, 2018); *D.B.*, 58 ECAB 464 (2007); *David Apgar*, 57 ECAB 137 (2005).

⁹ *A.D.*, Docket No. 17-1855 (issued February 26, 2018); *C.B.*, Docket No. 08-1583 (issued December 9, 2008); *D.G.*, 59 ECAB 734 (2008), *Bonnie A. Contreras*, *supra* note 7.

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

¹¹ *Joseph H. Surgener*, 42 ECAB 541, 547 (1991).

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

travel” at the time of the alleged incident. In a statement to the employing establishment and in a statement in response to a development letter from OWCP appellant explained that her shoulder injury was the result of intense physical conditioning which was a part of the training. The training was noted to include exercises such as pushing weighted sand bags on a mat and using dumbbell weights and punching up and out in a standing position. Appellant indicated that she first had an onset of pain on April 18, 2017, but she did not feel “extended pain” until April 25, 2017. She informed her physical training instructor of her pain and was advised to rest. Appellant submitted a note from K.T., a health and fitness instructor at the FBI Academy, who confirmed that he received an e-mail from her on April 25, 2017 noting she had been experiencing a great deal of pain and had limited mobility in her right shoulder. K.T. advised that she stated she was limited in what she could perform in training due to her shoulder condition. While at the FBI National Academy appellant obtained treatment for her right shoulder -- seeing a massage therapist on May 5, 2017 and reported to the clinic and obtained pain medications on May 9, 2017. It was not until she returned to her duty station after graduation from the training program that she had an MRI scan on August 4, 2017 and thereafter understood the severity of her condition.

The Board finds that appellant’s description of the incident on the Form CA-1 and the statement from K.T., who noted receiving an e-mail about an injury on April 25, 2017, are sufficient to establish that the April 25, 2017 employment incident occurred at the time, place, and in the manner alleged. Appellant provided a consistent account of the mechanism of injury that has not been refuted by evidence contained in the record.¹³ The medical evidence of record also substantiated her description of the right shoulder injury while in intensive physical training at the FBI National Academy. In her treatment with a nurse practitioner at the employing establishment’s occupational health unit, as well as with Dr. Kaelin, appellant consistently explained the onset of her pain while on travel status for training. While J.V., the employing establishment’s workers’ compensation representative, asserted that the shoulder condition occurred over a period of time and not due to one incident, it was not disputed that she sustained a shoulder injury while on travel status for intensive physical training.

As noted above, a claimant’s statement that an injury occurred at a given time and 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 the April 25, 2017 employment incident occurred in the performance of duty, as alleged.

As appellant has established that the April 25, 2017 employment incident factually occurred, the question becomes whether this incident caused an injury.¹⁵ The Board will, therefore, set aside OWCP’s October 12, 2017 decision and remand the case for consideration of the medical evidence. Following this and other such further development as is deemed necessary, OWCP shall issue a *de novo* decision addressing whether appellant has met her burden of proof to

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).

¹⁴ *A.C.*, Docket No. 18-1567 (issued April 9, 2019); *Gregory J. Reser*, 57 ECAB 277 (2005).

¹⁵ See *C.M.*, Docket No. 19-0009 (issued May 24, 2019).

establish an injury or 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 fact of injury.¹⁷

ORDER

IT IS HEREBY ORDERED THAT the October 12, 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: August 13, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹⁶ *Supra* note 14; see also *Betty J. Smith* 54 ECAB 174 (2002).

¹⁷ Due to the disposition of issue 1, issue 2 is rendered moot.