United States Department of Labor
Employees' Compensation Appeals Board

J.G., Appellant	)	
and	)	**Docket No. 19-0466**
	)	**Issued: December 20, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Cleveland, OH, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 28, 2018 appellant, through counsel, filed a timely appeal from a November 7, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[3]

[1] 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.

[2] 5 U.S.C. § 8101 *et seq.*

[3] The Board notes that, following the November 7, 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.*

ISSUE

The issue is whether appellant has met her burden of proof to establish an injury in the performance of duty on August 23, 2016, as alleged.

FACTUAL HISTORY

On October 18, 2016 appellant, then a 54-year-old sales, services and distribution associate, filed a traumatic injury claim (Form CA-1) alleging that on August 23, 2016 she strained her right upper arm when lifting trays while in the performance of duty. On the reverse side of the claim form, appellant's supervisor acknowledged that she was in the performance of duty when the injury occurred. The supervisor also responded "yes" when asked if he agreed with appellant's statements surrounding the incident.

In an October 18, 2016 handwritten statement, appellant related that the last week of August 2016 she was lifting heavy trays of mail and noticed that her arm was hurting more when she reached to the top rows. She indicated that she took pain medication and continued to work. Appellant reported that she saw a specialist on September 26, 2016 and underwent a magnetic resonance imaging (MRI) scan, which showed that she needed surgery on her right arm.

OWCP received a handwritten statement from the employing establishment with an illegible signature. It indicated that on September 26, 2016 appellant had asked for an occupational disease claim form (Form CA-2) because her shoulder was hurting and alleged that she was unsure whether she sustained an on-the-job injury.

In an October 20, 2016 development letter, OWCP advised appellant that, when her claim was first received, it appeared to be a minor injury that resulted in minimal or no lost time from work. It advised that, because she had not returned to full-time work, her claim would be formally adjudicated. OWCP also advised appellant of the type of factual and medical evidence needed to establish her claim and provided a questionnaire for her completion. It afforded her 30 days to submit the necessary factual and medical evidence.

In an October 21, 2016 letter, A.W., a health and resource management specialist for the employing establishment, controverted appellant's claim on the basis of fact of injury.

In an October 27, 2016 attending physician's report (Form CA-20) and duty status report (Form CA-17), Dr. Reuben Gobezie, a Board-certified orthopedic surgeon, noted a date of injury of August 23, 2016. He related that appellant was lifting a heavy package at work and noticed a severe increase of right shoulder pain. Dr. Gobezie diagnosed right shoulder large rotator cuff tear and impingement with biceps tendinitis. He indicated that appellant could not return to work.

On November 3, 2016 appellant completed OWCP's development questionnaire. She explained that on August 23, 2016 she was lifting heavy overstuffed trays of letters, then accountable boxes like express boxes. Appellant related that she experienced pain and difficulty putting letters in the top row, but she continued to work despite the pain. She indicated that after the date of injury she could not raise her arm above her shoulder and could not sleep well. Appellant reported that she did not sustain any other injury and that she reported the injury on

August 29, 2016. In response to the question of whether she was claiming an occupational disease or traumatic injury, she clarified that she was claiming a traumatic injury.

By decision dated November 30, 2016, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish that the August 23, 2016 employment incident occurred, as alleged. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On December 7, 2016 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative. A telephonic hearing was held on June 20, 2017. Appellant described her employment duties as a clerk, specifically lifting boxes and trays of mail filled with flat letters and magazines. She recounted that on August 23, 2016 she picked up a tray and noticed that her arm was hurting. Appellant reported that she notified her supervisor, but was able to keep working with pain killers.

By decision dated September 1, 2017, an OWCP hearing representative affirmed the November 30, 2016 decision.

On August 9, 2018 appellant, through counsel, requested reconsideration.

In a June 6, 2018 letter, Dr. Gobezie related that he first treated appellant on September 26, 2016 for complaints of right shoulder pain after an August 23, 2016 employment injury. He described that she was "lifting heavy overstuffed trays and had to lift letters into the top row" when her right arm began to hurt. Dr. Gobezie noted his initial examination findings and indicated that a right shoulder MRI scan revealed complete tears of the supraspinatus and infraspinatus tendons, a partial tear of the long head biceps tendon, a subacromial sprain, and small glenohumeral joint effusion decompressing the subacromial subdeltoid space. He reported that appellant underwent right shoulder arthroscopic surgery repair on February 6, 2017. Dr. Gobezie opined that she suffered a rotator cuff tear, biceps tendinitis, and impingement as a result of the August 23, 2016 employment injury. He explained that, if appellant's injury was more chronic, there would be more atrophy of the rotator cuff and chronic inflammation of the biceps tendon.

By decision dated November 7, 2018, OWCP denied modification of the September 1, 2017 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[4] 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,[5] 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

[4] *Supra* note 2.

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

the employment injury.[6] 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.[7]

In order to determine whether a federal employee has sustained a traumatic injury in the performance of duty, OWCP must first determine whether fact of injury has been established.[8] 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.[9] Second, the employee must submit evidence, in the form of probative medical evidence, to establish that the employment incident caused a personal injury.[10]

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.[11] 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.[12] 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.[13] 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 prima facie case has been established.[14]

ANALYSIS

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

The evidence appellant submitted provides a consistent description of the August 23, 2016 employment incident, and is sufficient to establish that the August 23, 2016 employment incident

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

[7] *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).

[8] *D.B.*, Docket No. 18-1348 (issued January 4, 2019); *S.P.*, 59 ECAB 184 (2007).

[9] *D.S.*, Docket No. 17-1422 (issued November 9, 2017); *Bonnie A. Contreras*, 57 ECAB 364 (2006).

[10] *B.M.*, Docket No. 17-0796 (issued July 5, 2018); *David Apgar*, 57 ECAB 137 (2005); *John J. Carlone*, 41 ECAB 354 (1989).

[11] *A.C.*, Docket No. 18-1567 (issued April 9, 2019); *D.B.*, 58 ECAB 529 (2007); *Gregory J. Reser*, 57 ECAB 277 (2005).

[12] *M.F.*, Docket No. 18-1162 (issued April 9, 2019); *Joseph H. Surgener*, 42 ECAB 541, 547 (1991); *Gene A. McCracken*, Docket No. 93-2227 (issued March 9, 1995).

[13] *P.A.*, Docket No. 19-1036 (issued November 19, 2019); *D.B.*, 58 ECAB 464 (2007).

[14] *M.C.*, Docket No. 18-1278 (issued March 7, 2019); *Betty J. Smith*, 54 ECAB 174 (2002).

occurred at the time, place, and in the manner alleged.[15] Her statements provided a single account of the mechanism of injury, specifically lifting trays of mail, which has not been refuted by any evidence in the record.[16] Medical evidence of record also substantiated appellant's description of the alleged August 23, 2016 employment incident. In a June 6, 2018 letter, Dr. Gobezie reported a history of injury that she sustained a right shoulder injury at work on August 23, 2016 when she was lifting trays of mail. He also explained how results from appellant's MRI scan demonstrated that her right shoulder injury was not a chronic condition. 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.[17] The Board finds, therefore, that appellant has established that the August 23, 2016 employment incident occurred, as alleged.

As appellant has established that the August 23, 2016 employment incident factually occurred, the question becomes whether this incident caused a personal injury.[18] The Board will, therefore, set aside OWCP's November 7, 2018 decision 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 causal relationship.

CONCLUSION

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

[15] *See B.S.*, Docket No. 19-0524 (issued August 8, 2019) (the Board found that statements from a claimant's supervisor and her coworker and the medical evidence were sufficient to establish that the employment incident occurred as alleged even though the claimant's description was vague); *see also S.W.*, Docket No. 19-0653 (issued November 21, 2019).

[16] *See S.W.*, Docket No. 17-0621 (issued May 24, 2017) (the Board found that the claimant had established that the employment incident occurred as alleged 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).

[17] *Supra* note 10.

[18] *See B.S.*, Docket No. 19-0524 (issued August 8, 2019); *Willie J. Clements*, 43 ECAB 244 (1991).

ORDER

IT IS HEREBY ORDERED THAT the November 7, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: December 20, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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