

duty. On the reverse side of the claim form, the employing establishment noted that he did not stop work and had not lost any time due to the alleged injury.

Appellant submitted an urgent care treatment note and an attending physician's report (Form CA-20) both dated November 28, 2017 and signed by Heather M. Shook, a nurse practitioner. The attending physician's report noted a date of injury of August 21, 2016. Appellant reported injuring his left shoulder "last year," and having "reinjured it working over the past several weeks." Ms. Shook characterized his condition as an "overuse injury." The urgent care treatment notes indicated that appellant was previously seen there for his left shoulder on three prior occasions. X-rays were obtained at the time of the original injury. Ms. Shook diagnosed left shoulder pain and referred appellant to an orthopedist. She also indicated that appellant could return to work with a 10-pound lifting restriction and only limited use of his left arm.

In a December 4, 2017 report, Dr. Brandon D. Bushnell, a Board-certified orthopedic surgeon, examined appellant for complaints of left shoulder pain. He noted that appellant indicated that in August 2016, while working at the employing establishment, he pulled a heavy package from the back of his vehicle, which injured his left shoulder. Appellant also told Dr. Bushnell that he reported the initial injury to his supervisor, but took over a year to get an appointment with a physician. In November 2016, he was involved in a motor vehicle accident (MVA) while at the employing establishment. Appellant was wearing his seatbelt during the accident, which increased shoulder pain after the motor vehicle accident. He told Dr. Bushnell that his workload had increased, which further aggravated his left shoulder over the last three months. On examination, Dr. Bushnell noted positive Neer's and Hawkins tests, increased weakness and pain with an empty can test of the left shoulder, and tenderness to palpation over the anterior aspect of the biceps. Dr. Bushnell also reviewed a December 4, 2017 left shoulder x-ray, which revealed a benign left shoulder with no evidence of fractures, dislocations, or any acute bony abnormalities. His clinical impression was left shoulder pain with chronic injury versus a possible, but unlikely left rotator cuff tear versus referred pain from the neck with radiculopathy. Dr. Bushnell prescribed medication and referred appellant for electrodiagnostic studies of the cervical and left shoulder regions.

In a February 8, 2018 development letter, OWCP requested that appellant provide additional factual and medical evidence describing how his alleged August 21, 2016 traumatic injury occurred and listing any diagnosed conditions that resulted from the alleged employment incident. It explained that medical evidence must be submitted by a qualified physician, and that nurse practitioners and physician assistants were not considered qualified physicians under FECA. OWCP afforded appellant 30 days to respond.

On February 14, 2018 OWCP received a copy of the November 28, 2017 urgent care treatment notes, cosigned by Dr. William G. Asbury, a Board-certified family practitioner.

On February 23, 2018 OWCP received an undated statement from appellant, explaining that the reason for the delay in filing his claim was that the employing establishment had not filed the injury report in a timely manner. Appellant noted that he had two different injuries at two different times to the same side of his body, but that the claim was only filed for the August 21, 2016 incident. He stated that he was not involved in any sports or activities and that he had no injuries on the same side of the body prior to or after these incidents.

OWCP also received a January 26, 2017 report from Dr. Azhar Nisar, a Board-certified internist, who examined appellant for complains of left shoulder pain. Appellant told Dr. Nisar that he was involved in a motor vehicle incident on November 27, 2017,² and that after the incident, he experienced left shoulder pain. Appellant also stated that he had shoulder pain before, “but not as bad.” On examination, Dr. Nisar diagnosed left shoulder pain and decreased abduction. Dr. Nisar diagnosed left shoulder pain and shoulder joint pain.

Additionally, x-rays taken on January 26, 2017 revealed a normal left shoulder with normal glenohumeral and acromioclavicular joint space, a normal scapula and clavicle, and normal upper left ribs.³

By decision dated March 15, 2018, OWCP denied appellant’s traumatic injury claim, finding that he had not submitted the necessary factual evidence to establish that the incident occurred in the performance of duty as described. It noted that three causes of left shoulder injury were provided: pulling trays of mail on August 21, 2016; a motor vehicle accident on “November 27, 2017;”⁴ and an “unknown injury several weeks prior to November 28, 2017.” OWCP explained that without a clear indication of how and when the claimed injury occurred, it was difficult to assess the locus of the injury. It concluded, therefore, that the requirements have not been met to establish an injury as defined by FECA.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁵ 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,⁶ 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.⁷ 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.⁸

² Dr. Nisar identified “November 27, 2017” as the date of appellant’s MVA. The reference to “2017” rather than 2016 appears to be a typographical error as Dr. Nisar’s report and x-ray are both dated January 26, 2017.

³ Dr. Elton C. Strickland, a Board-certified diagnostic radiologist, interpreted the January 26, 2017 x-rays.

⁴ OWCP’s decision identified “November 27, 2017” as the date of appellant’s MVA. The reference to “2017” rather than 2016 appears to be a typographical error.

⁵ *Supra* note 1.

⁶ *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).

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

⁸ *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).

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.⁹ 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 allegedly occurred.¹⁰ The second component is whether the employment incident caused a personal injury.¹¹

An employee's statement 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.¹² Moreover, an injury does not have to be confirmed by eyewitnesses.¹³ The employee's statement, however, must be consistent with the surrounding facts and circumstances and his or her subsequent course of action. 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.¹⁴

ANALYSIS

The Board finds that appellant has met his burden of proof to establish that the August 21, 2016 employment incident occurred in the performance of duty, as alleged.

On his July 3, 2017 Form CA-1, appellant claimed to have injured his left shoulder on August 21, 2016 when pulling trays of flats and parcels from the back seat of his vehicle while in the performance of duty. He described his injury as a left shoulder strain. In response to OWCP's February 8, 2018 development letter, appellant clarified that although he had a subsequent injury to his left shoulder, this claim was only for the August 21, 2016 injury.

Moreover, the November 28, 2017 urgent care treatment note and the Form CA-20 completed by Ms. Shook described the claimed August 21, 2016 employment injury. Similarly, in a report dated December 4, 2017, Dr. Bushnell noted that appellant indicated that in August 2016, while working at the employing establishment, he pulled a heavy package from the back of his car, which injured his shoulder.

As appellant has consistently maintained, and the contemporaneous medical evidence supports, that an employment incident occurred in the performance of duty on August 21, 2016, the Board thus finds that the claimed employment incident occurred, as alleged.

⁹ *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *T.H.*, 59 ECAB 388, 393-94 (2008).

¹⁰ *L.T.*, Docket No. 18-1603 (issued February 21, 2019); *Elaine Pendleton*, 40 ECAB 1143 (1989).

¹¹ *B.M.*, Docket No. 17-0796 (issued July 5, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

¹² *R.T.*, Docket No. 08-0408 (issued December 16, 2008); *Gregory J. Reser*, 57 ECAB 277 (2005).

¹³ *L.A.*, Docket No. 17-0138 (issued April 5, 2017).

¹⁴ *Id.*

Given that appellant has established that the August 21, 2016 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 March 15, 2018 decision and remand the case for consideration of the medical evidence of record.¹⁵ After this and any further development as deemed necessary, OWCP shall issue a *de novo* decision on the issue of whether appellant has met his burden of proof to establish an employment-related injury.

CONCLUSION

The Board finds that appellant has established that the August 21, 2016 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 he has established a traumatic injury causally related to the accepted August 21, 2016 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the March 15, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision.

Issued: June 26, 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

¹⁵ See *J.C.*, Docket No. 18-1803 (issued April 19, 2019); *C.M.*, Docket No. 17-0891 (issued October 20, 2017).