United States Department of Labor
Employees' Compensation Appeals Board

D.R., Appellant	)	
and	)	**Docket No. 19-0072**
	)	**Issued: June 24, 2019**
DEPARTMENT OF HOMELAND SECURITY, CUSTOMS & BORDER PROTECTION, Sonoita, AZ, 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
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 11, 2018 appellant filed a timely appeal from a July 3, 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]

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that appellant submitted additional evidence on appeal. 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 his burden of proof to establish an injury in the performance of duty on June 26, 2017, as alleged.

FACTUAL HISTORY

On July 10, 2017 appellant, then a 38-year-old border patrol agent, filed a traumatic injury claim (Form CA-1) alleging that he sustained severe irritation, redness, and swelling of the right eye on June 26, 2017 while in the performance of duty. He indicated that he was injured while putting a seismic sensor in the ground and got something in his eye.

In hospital records dated July 17 and 18, 2017, Dr. Rachelle Halasa, an emergency medicine physician, diagnosed episcleritis right eye and related that appellant reported debris got into his right eye on June 23, 2017 and he developed blurred vision three days after the injury with episodes of no vision in the right eye. Appellant indicated that he was unsure as to what may have flown into his eye and reported that it was "maybe grass, or dust." He went to the emergency department because he was concerned with changes in his vision in the right eye and reported seeing spots and experiencing hazy vision. Appellant also reported that he was diagnosed with corneal abrasion on "June 26th" and was given antibiotic ointment by an optometrist. The records further indicated that he was previously seen on January 29, 2016 and at that time, was noted to have a history of traumatic mydriasis caused by an injury to his right eye while playing golf in high school. Dr. Halasa released appellant back to work on July 18, 2017.

In reports dated August 3, September 12, and November 1, 2017, Dr. Todd Altenbernd, a Board-certified ophthalmologist, diagnosed subacute iritis and related that appellant had a history of trauma to the right eye in June 2017. He found that appellant had an iris atrophy in the right eye temporally and the reaction had remained despite aggressive medication use. Dr. Altenbernd further related that appellant had an iritis since July 2015 and noted a prior episode of herpes zoster in the right V1 distribution during high school. He provided a presumptive diagnosis of herpes zoster and prescribed medication. Dr. Altenbernd opined that appellant's condition "may also represent post-traumatic iritis, but the granulomatous nature does not go along with this diagnosis."

In reports dated October 12, 25, and 30, 2017, Dr. Shree Kurup, a Board-certified ophthalmologist, diagnosed posterior cyclitis, right eye, and related that appellant "got something in the eye" on June 26, 2017. Appellant related that "his cornea was scratched and he had iritis." He also reported that he had been treated elsewhere but because his condition was not improving he was referred to Dr. Kurup.

In a report of injury, for the State of Arizona dated October 25, 2017, appellant described the cause of his alleged work incident as having experienced something small flying into his eye on a windy day. He indicated that it may have been dirt or grass, but did not know. Appellant used artificial tears in the eye, but when his condition did not improve after a few days he visited an eye doctor.

In a development letter dated January 23, 2018, OWCP indicated that when appellant's claim was received it appeared to be a minor injury that resulted in minimal or no lost time from

work and, based on these criteria and because the employing establishment did not controvert continuation of pay or challenge the case, payment of a limited amount of medical expenses was administratively approved. It noted that it had reopened the claim for formal consideration of the merits because the medical bills had exceeded $1,500.00. OWCP requested additional evidence and afforded appellant 30 days to respond to its inquiries.

In response, appellant submitted a February 9, 2018 narrative statement indicating that he was driving on his way to work on a sensor at the top of Saddle Mountain, south of Patagonia, Arizona. Shortly after he got out of his vehicle, appellant felt some debris in his right eye. The wind was blowing, so he figured he got dust in his eye. He stated that it "didn't hurt -- just felt like an eyelash was in there." Appellant asserted that he was working alone that shift. His right eye felt uncomfortable, but it was not painful. He had some sterile artificial tears that he applied when he got to his car that he used for dry eyes hoping that it would flush out any debris that was in there. Appellant still had the feeling of something being in his eye even after he had applied the drops. He called his eye doctor to see if she could take a look at it. Appellant noted that when he was 16 years old he had a shingles reaction in his right eye that was treated with medication. He asserted that he had some scarring, but it did not affect his vision. Appellant was treated in El Paso, Texas in 1995 and he had no medical records from this incident.

In an attending physician's report (Form CA-20) dated February 20, 2018, Dr. Kurup found uveitis, right eye, and diagnosed traumatic iritis complicated by viral keratitis. He opined, by checking a box marked "yes" that appellant's had sustained a corneal abrasion at work on June 26, 2017.

On March 8, 2018 Dr. Kurup indicated that appellant had been his patient for the past six months and the date of injury related to his job was June 2017. He explained that appellant had a herpes simplex virus (HSV) associated uveitis which "can reactivate under stress." Dr. Kurup opined that appellant's condition was directly related to work and it was associated with the recurrence of the inflammation in the eye as this was typical for this condition.

By decision dated March 22, 2018, OWCP denied the claim finding that the evidence of record failed to establish that the injury and/or events occurred on June 26, 2017, as alleged. It concluded, therefore, that appellant had not met the requirements to establish an injury as defined under FECA.

On April 10, 2018 appellant requested reconsideration and submitted an April 10, 2018 narrative statement indicating that he had worked as a border patrol agent since December 2007. He stated that for the past 14 months he had been working a detail on the sensor team with seven other agents. Appellant worked the early day shift for 10 hours per day maintaining buried ground sensors, camera sensors that were mostly in trees, and other various electronic equipment throughout a mountainous 750+ square mile Sonora Desert. He indicated that he had mistakenly identified his date of injury as June 26, 2017, when it was actually June 22, 2017. Appellant explained that his task for that day on June 22, 2017 was to hike up Saddle Mountain to replace a dead battery. He stated that the vehicle he was driving slid off the side of the road and when he exited the vehicle to attempt to get the vehicle back on the road a strong gust of wind peppered him with dirt, dust, and debris and although he was wearing sunglasses, he immediately felt something hit his right eye. Appellant started blinking his eye to help lubricate it hoping that

whatever debris/dust flew into his eye would come out. He was eventually able to pull his vehicle back on the road and drive down the mountain to his station, but decided not to report his injury to his supervisor that day. Appellant continued to use artificial tear drops for the rest of the day and his eye was noticeably red and irritated. After his condition remained unchanged, he called his doctor and scheduled an eye appointment for Monday, June 26, 2017. Appellant further noted that his lupus condition had never affected his vision before and his HSV condition had only caused an occasional cold sore every couple of years.

In an April 23, 2018 report, Dr. Dominick Sudano, a rheumatologist, indicated that he had been following appellant's case of lupus for several years. Appellant came to his office on July 10, 2017 for an irritation in his right eye after debris got into it while at work. Dr. Sudano opined that appellant's lupus was not active and this was confirmed by laboratory work that was drawn that same day. No changes were made to his lupus medication. Dr. Sudano concluded that based on appellant's history, examination, and laboratory work, the eye irritation was not related to his lupus condition.

By decision date July 3, 2018, OWCP denied modification of its prior decision. It found discrepancies, inconsistencies, and contradictions in appellant's statements describing his injury that created serious doubt that the injury was sustained in the manner alleged, particularly regarding the specific date of injury and what type of object went into his eye.

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

To determine if an employee has sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. 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] *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).

[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).

allegedly occurred.[6] The second component is whether the employment incident caused a personal injury.[7]

An employee has the burden of establishing the occurrence of an injury at the time, place, and in the manner alleged, by a preponderance of the reliable, probative, and substantial evidence. 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 surrounding facts and circumstances and his or her subsequent course of action.[8] 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. 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 sufficient doubt on an employee's statement 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.[9]

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish an injury in the performance of duty on June 26, 2017, as alleged.[10]

In *R.M.*,[11] the claimant alleged that a coworker shook an umbrella with wet debris towards her and some of this fluid got into her eye causing an injury. The employee had provided one basic account of the mechanism of the employment incident, reported the incident to a supervisor that same evening, as well as upon her arrival to work the next morning, and a witness statement from another coworker who saw water being splashed on her face causing her to use both hands to wipe her face clean. The Board found that the factual evidence of record overwhelmingly and consistently stated that the employee's coworker shook a wet umbrella towards her and, therefore, the claimant had alleged with specificity that the incident occurred at the time, place, and in the

[6] *D.B.*, Docket No. 18-1359 (issued May 14, 2019); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[7] *M.H.*, Docket No. 18-1737 (issued March 13, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

[8] *See T.M.*, Docket No. 17-1194 (issued February 4, 2019); *Gene A. McCracken*, Docket No. 93-2227 (issued March 9, 1995).

[9] *See L.D.*, Docket No. 19-0039 (issued May 7, 2019); *Constance G. Patterson*, 41 ECAB 206 (1989); *Thelma S. Buffington*, 34 ECAB 104 (1982).

[10] *See A.B.*, Docket No. 14-0522 (issued November 9, 2015) (fact of injury not established where there was substantial inconsistency between the employee's account of events and the accounts of coworkers and supervisor with regard to the time and place of his alleged injury); *V.J.*, Docket No. 13-1460 (issued January 7, 2014) (claimed incident not established where employing establishment investigation revealed inconsistencies between the employee's account of the claimed incident and those of coworkers); *J.W.*, Docket No. 12-0926 (issued October 1, 2012) (claimed incident not established where there were inconsistencies between the employee's statements and evidence at the scene of the alleged incident).

[11] Docket No. 12-1448 (issued December 4, 2012).

manner alleged.[12] Herein, appellant provided two different dates of injury, and provided no definitive mechanism of injury, as he was unsure as to what may have flown in his eye and there were no witnesses to corroborate appellant's claim that he injured his right eye at the time of the alleged June 26, 2017 employment incident.

In hospital records dated July 17 and 18, 2017, Dr. Halasa diagnosed episcleritis right eye and related that appellant was injured at the end of June when he was at work "when something flew into his eyes." In reports dated October 12, 25, and 30, 2017, Dr. Kurup diagnosed posterior cyclitis, right eye, and related that appellant "got something in the eye" on June 26, 2017. The Board finds that these statements are insufficient to establish appellant's claim because the reports from Dr. Halasa and Dr. Kurup are not contemporaneous with the alleged June 26, 2017 work incident and they failed to identify specific details of the time and location of the incident in question.

Thus, the Board finds that appellant has not met his burden of proof to establish an injury in the performance of duty on June 26, 2017, as alleged. Since appellant failed to establish the first component of fact of injury, it is unnecessary to discuss whether he submitted medical evidence sufficient to establish that a medical condition existed and whether the condition was causally related to the employment exposure alleged.[13]

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish an injury in the performance of duty on June 26, 2017, as alleged.

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

[13] As appellant failed to establish that the claimed event occurred as alleged, it is not necessary to discuss the probative value of medical evidence. *See S.S.*, Docket No. 18-0242 (issued June 11, 2018); *S.J.*, Docket No. 17-1798 (issued February 23, 2018).

ORDER

IT IS HEREBY ORDERED THAT the July 3, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 24, 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