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

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| **L.G., Appellant** | ) | |
| **and** | ) | **Docket No. 19-0201** |
| | ) | **Issued: June 26, 2019** |
| **DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, East Boston, MA, Employer** | ) | |

*Appearances:*
*Capp P. Taylor, Esq.*, for the appellant[1]
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

## ***JURISDICTION***

On November 7, 2018 appellant, through counsel, filed a timely appeal from a September 20, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP).

[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.

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]

## ***ISSUE***

The issue is whether appellant has met his burden of proof to establish a lumbar injury in the performance of duty.

## ***FACTUAL HISTORY***

On December 14, 2016 appellant, then a 41-year-old transportation security officer, filed an occupational disease claim (Form CA-2) alleging that he sustained a herniated lumbar disc and degenerative disc disease of the lower back due to factors of his federal employment which included lifting bags, patting down people, bending, pushing, and pulling. He pointed out that he is 6 feet, 5 inches tall and, at that height, performing the described employment duties placed a lot of stress on his lower back. Appellant indicated that he originally filed a traumatic injury claim (Form CA-1), but was advised to file a Form CA-2.[4] On the reverse side of the claim form, the employing establishment related that he first reported his condition to his supervisor on April 15, 2014, and that he was last exposed to conditions alleged to have caused his condition on January 15, 2015. It noted that appellant was removed from federal employment on January 15, 2015.

In a development letter dated January 5, 2017, OWCP advised appellant that it required additional factual and medical evidence to determine whether he was eligible for FECA benefits. It attached a questionnaire, requesting that he provide a detailed description of the employment factors he believed contributed to his disease, including a description of the exact medical condition he was claiming, relevant dates, locations, and required duties alleged. OWCP also requested that appellant's attending physician provide a comprehensive narrative medical report. It afforded appellant 30 days to submit the necessary evidence. In a separate development letter of even date, OWCP requested that the employing establishment respond to his allegations.

In a letter dated January 21, 2017, a supervisor from the employing establishment noted that he worked with appellant "for one Saturday after he claimed to have injured himself." He related that appellant did not have any medical documentation available to support his claim that day, but he was still "given the opportunity to work in a modified rotation for most of his shift." The supervisor also related that he "[did] not recall how many bag searches or pat downs appellant

[2] 5 U.S.C. § 8101 *et seq.*

[3] 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.*

[4] Appellant indicated that the prior claim was filed under OWCP File No. xxxxxx335 for an April 13, 2014 injury.

performed before he was allowed to work in the modified rotation." The employment establishment attached appellant's position description.

By decision dated March 8, 2017, OWCP denied appellant's claim finding that he did not submit any medical evidence containing a medical diagnosis causally related to the accepted employment factors. It concluded, therefore, that he had not met the requirements to establish an injury as defined under FECA.

On March 21, 2017 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

In a letter dated August 1, 2017, Dr. David Ting, an internal medicine specialist, indicated that appellant had been a patient of his for several years. He related that appellant's diagnosis was degenerative disc disease with neural foraminal narrowing, supported by a clinical examination including lack of range of motion, stiffness, and complaints of pain. Dr. Ting noted that the diagnosis was also corroborated by a magnetic resonance imaging (MRI) scan dated April 24, 2014. He related that appellant did not have lumbar discomfort prior to beginning employment as a transportation security officer in August 2013. Dr. Ting reported that appellant's employment duties included continual bending at the waist, stooping, lifting luggage, and twisting. He also noted that appellant suffered an incident on March 14, 2014 when he mis-stepped off a curb and sprained his lumbar spine, but he returned to work shortly thereafter performing his regular employment duties. Dr. Ting related that in April 2014, appellant's symptoms returned, and he underwent an MRI scan which revealed degenerative disc disease. He indicated that the repetitive activities appellant performed at work would be sufficient to cause or at least contribute to his diagnosis. Dr. Ting opined the possibility that his employment activities exacerbated an underlying asymptomatic degenerative condition. He noted that appellant had limitations with regard to walking, standing, and sitting.

On August 30, 2017 a telephonic hearing was held before an OWCP hearing representative. At the hearing appellant testified regarding his employment duties after his return to work on April 13, 2014, which he alleged required that he lift bags weighing between 5 and 50 pounds, and also required that he stoop, bend, and stand for eight hours a day.

By decision dated October 19, 2017, OWCP's hearing representative affirmed, but modified, the March 8, 2017 decision. She noted that appellant had filed a prior traumatic injury claim (Form CA-1), alleging that on March 30, 2014 he ruptured a lumbar disc when he stepped off a curb and caught himself before falling, OWCP File No. xxxxxx251. That claim was denied as the medical evidence did not establish that the diagnosed medical conditions were causally related to the accepted employment incident. The hearing representative also noted that appellant had filed a second Form CA-1 alleging that on April 13, 2014 he injured his low back because he had returned to work with a doctor's note restricting him from lifting more than 20 pounds, stooping, or bending at the waist, but these restrictions were disregarded by his supervisor. That claim was assigned OWCP File No. xxxxxx335. The hearing representative related that that claim was denied because the medical evidence did not establish that the diagnosed lumbar conditions were causally related to the work factors. She indicated that appellant's three OWCP files should be combined. The hearing representative concluded that in the current case appellant had not established the factual component of fact of injury because the employing establishment had

disputed that appellant worked beyond his physical restrictions after his return to work in April 2014.

On May 8, 2018 Dr. Ting provided a supplemental report. He argued that appellant's employment duties after March 30, 2014 were irrelevant in determining whether his duties caused injury to his lumbar spine because the prior duties were sufficient to aggravate or cause his condition. Dr. Ting related that the excessive bending and twisting placed abnormal wear and tear on the spine causing or contributing to the neural foraminal narrowing and nerve root compression.

On July 9, 2018 appellant, through counsel, requested reconsideration of OWCP's hearing representative's October 19, 2017 decision. Counsel submitted argument along with his request.

By decision dated September 20, 2018, OWCP denied modification of the October 19, 2017 decision finding that the evidence of record was insufficient because it failed to address the factual deficiencies of his claim.

## ***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 filed within the applicable time limitation; that an injury was sustained while in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[5] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.[6]

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.[7]

With respect to the first component of fact of injury, the employee has the burden of proof to establish the occurrence of an injury at the time, place, and in the manner alleged, by a preponderance of the reliable, probative, and substantial evidence.[8] An injury does not have to be

[5] *A.F.*, Docket No. 18-1154 (issued January 17, 2019); *C.S.*, Docket No. 08-1585 (issued March 3, 2009); *Elaine Pendleton,* 40 ECAB 1143 (1989).

[6] *A.F., id.*; *S.P.*, 59 ECAB 184 (2007); *Victor J. Woodhams*, 41 ECAB 345 (1989); *Joe D. Cameron,* 41 ECAB 153 (1989).

[7] *See M.S.*, Docket No. 18-1554 (issued February 8, 2019).

[8] *T.J.*, Docket No. 17-0831 (issued November 7, 2017); *David Apgar,* 57 ECAB 137 (2005).

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 his or her subsequent course of action.[9] 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.[10] 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 statements in determining whether a *prima facie* case has been established.[11] However, 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.[12]

## ***ANALYSIS***

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

In his December 14, 2016 Form CA-2, appellant alleged that his duties as a TSA security officer required that he lift bags, pat down travelers, bend, push, and pull during the course of his federal employment. The record establishes that he returned to work on April 13, 2014 and performed the aforementioned work duties until he was separated from federal employment on January 15, 2015. The Board therefore finds that appellant has established that the alleged occupational exposure occurred in the manner alleged.[13]

As appellant has established occupational exposure, further consideration of the medical evidence is necessary.[14] For these reasons, the case will be remanded to OWCP for evaluation of the medical evidence to determine whether there is a causal relationship between appellant's diagnosed lumbar conditions and the accepted factors of his federal employment. Following such further development as OWCP deems necessary, it shall issue a *de novo* decision.

## ***CONCLUSION***

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

[9] *See C.R.*, Docket No. 18-1332 (issued February 13, 2019); *see Betty J. Smith*, 54 ECAB 174 (2002).

[10] *See C.R., id.*; *Linda S. Christian*, 46 ECAB 598 (1995).

[11] *Id.*

[12] *T.B.*, Docket No. 16-1315 (issued June 21, 2017); *Gregory J. Reser*, 57 ECAB 277 (2005).

[13] *See M.D.*, Docket No. 18-1365 (issued March 12, 2019).

[14] *Id.*

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the September 20, 2018 decision of the Office of Workers' Compensation Programs is set aside and this case is remanded for further proceedings consistent with this opinion.

Issued: June 26, 2019
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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