

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

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S.W., Appellant )  
 )  
and )  
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DEPARTMENT OF THE AIR FORCE, 283<sup>rd</sup> )  
COMBAT COMMUNICATIONS SQUADRON, )  
DOBBINS AIR FORCE BASE, GA, Employer )  
\_\_\_\_\_ )

**Docket No. 19-0653**  
**Issued: November 21, 2019**

*Appearances:* *Case Submitted on the Record*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

**DECISION AND ORDER**

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

**JURISDICTION**

On February 1, 2019 appellant filed a timely appeal from a January 17, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

**ISSUE**

The issue is whether appellant has met his burden of proof to establish an injury in the performance of duty, as alleged.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that, following the January 17, 2019 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 evidence for the first time on appeal. *Id.*

## **FACTUAL HISTORY**

On June 26, 2018 appellant, then a 43-year-old security manager, filed a traumatic injury claim (Form CA-1) alleging that on January 2, 2018 he injured his lower back while in the performance of duty. He explained that when he lifted an elliptical machine off of a furniture dolly with the help of another person, the machine slipped, causing appellant to quickly adjust, which jarred his back and caused sciatic nerve damage. On the reverse side of the claim form, the employing establishment acknowledged that the incident occurred while appellant was in the performance of duty. It further indicated that appellant stopped work on January 2, 2018 and returned to work on January 8, 2018.

On July 3, 2018 OWCP received appellant's hospital records indicating that he was seen in the emergency room for right leg pain, right lower back pain, and intermittent numbness. Appellant indicated that on December 26, 2017 while he was carrying an elliptical machine he had to shift his back, which resulted in immediate muscle spasms and pain in his right lower back. He reported that the pain had improved, but he still experienced numbness in his right leg when sitting for a significant period of time. The records also noted that the "current episode" of his pain began gradually and over two days ago, and that the issue occurs on a daily basis and was related to his twisting and lifting heavy objects. They documented that the pain was in appellant's lumbar spine and was moderate, but shooting and stabbing radiated to the right thigh, and worsened with particular positions. The records recorded that other symptoms included paresthesias, leg pain, and numbness.

Dr. Jay P. Patel, a Board-certified diagnostic radiologist, found that appellant experienced pain in his lumbar back, and in an anatomy diagram he circled the lower right back to indicate where appellant's pain was located. He found that appellant's lumbar back had "normal range of motion, no tenderness, no bony tenderness, no swelling, no edema, no deformity, no laceration, no spasm and normal pulse." An x-ray of appellant's lumbar spine indicated that his "vertebral body heights and alignments are maintained. No acute fracture or dislocation. Soft tissues are otherwise grossly unremarkable," and "no acute osseous abnormalities."

A nurse practitioner, Eleanor E. Girodo, indicated that appellant had lumbar radiculopathy and diagnosed appellant with right-sided sciatica and acute right-sided low back pain. She prescribed medication and provided follow-up advice. The nurse practitioner additionally recorded that appellant would be able to return to work on January 5, 2018. The records indicated that appellant was also diagnosed with hypertension and skin paresthesia and discharged on January 3, 2018.

In a December 13, 2018 development letter, OWCP advised appellant that, when his claim was received, it appeared to be a minor injury that resulted in minimal or no lost time from work. The claim was administratively approved to allow payment for limited medical expenses, but the merits of the claim had not been formally adjudicated. OWCP advised appellant that his claim was being reopened due to unpaid bills. However, additional evidence was required in support of his claim for compensation benefits. OWCP advised appellant of the type of factual and medical evidence needed and provided a questionnaire for his completion. It afforded him 30 days to submit the requested evidence.

On January 10, 2019 appellant called OWCP and indicated that he was injured on December 26, 2017 and went to see a physician on January 2, 2018. The claims examiner memorialized the conversation in a memorandum (Form CA-110). Additionally, appellant submitted an undated incident report signed by his supervisor, his unit safety representative, and his commander. The report indicated that on December 26, 2017 while in the performance of duty appellant and another sergeant were transporting an elliptical machine to the new gym area with a dolly, and when they removed the elliptical machine from the dolly the machine moved quickly, causing appellant to strain his back. The report listed the other sergeant involved in the incident as a witness.

By decision dated January 17, 2019, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish that he sustained an injury in the performance of duty, as alleged. It noted that he had not returned OWCP's development questionnaire, which was needed to clarify the contradicting evidence on the date of the employment injury. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>3</sup> 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,<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

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.<sup>7</sup> 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.<sup>8</sup> Second, the employee must

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<sup>3</sup> *Supra* note 1.

<sup>4</sup> *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).

<sup>5</sup> *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

<sup>6</sup> *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).

<sup>7</sup> *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).

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

submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.<sup>9</sup>

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, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.<sup>10</sup> The employee has not met his or her burden of proof to establish the occurrence of an injury when there are inconsistencies in the evidence that 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 statements in determining whether a *prima facie* case has been established. An employee's statements 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.<sup>11</sup>

### ANALYSIS

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

On his June 26, 2018 Form CA-1, appellant alleged that he injured his lower back on January 2, 2018 when he lifted an elliptical machine off of a furniture dolly with the help of another person, and the machine slipped, causing him to quickly adjust. However, appellant's January 3, 2018 emergency room treatment records reflected that he reported having been injured on December 26, 2017 while carrying an elliptical machine. OWCP subsequently requested that appellant clarify the discrepancy regarding the date of injury, and provided him a factual questionnaire to complete and submit. Although appellant did not return the factual questionnaire, he telephoned OWCP (CA-110 notes) on January 10, 2019 and advised that he was injured on December 26, 2017. He also submitted an employing establishment incident report, which indicated that he and another employee were transporting an elliptical machine on a dolly when the machine moved quickly, causing appellant to strain his back.

The Board finds that appellant established that the incident involving the elliptical machine occurred as alleged, on December 26, 2017. The employing establishment incident report, coupled with the contemporaneous January 3, 2018 emergency room treatment records, as well as appellant's subsequent clarification establish that the alleged incident occurred on December 26, 2017. Moreover, appellant has provided a single account of the mechanism of injury that has not been refuted by any evidence in the record.<sup>12</sup> 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

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<sup>9</sup> *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.

<sup>10</sup> *M.F.*, Docket No. 18-1162 (issued April 9, 2019); *Charles B. Ward*, 38 ECAB 667, 67-71 (1987).

<sup>11</sup> *See M.C.*, Docket No. 18-1278 (issued March 7, 2019); *D.B.*, 58 ECAB 464, 466-67 (2007).

<sup>12</sup> *B.S.*, Docket No. 19-0524 (issued August 8, 2019).

probative value and will stand unless refuted by strong or persuasive evidence.<sup>13</sup> The Board therefore finds that appellant has established that the December 26, 2017 employment incident occurred in the performance of duty, as alleged.

As appellant has established that the December 26, 2017 employment incident factually occurred, the question becomes whether this incident caused a personal injury.<sup>14</sup> The Board will, therefore, 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 his burden of proof to establish an injury or condition causally related to the accepted December 26, 2017 employment incident.

**CONCLUSION**

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

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 17, 2019 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: November 21, 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

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<sup>13</sup> *Supra* note 11.

<sup>14</sup> *Supra* note 12.