

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

M.L., Appellant)	
)	
and)	Docket No. 19-0361
)	Issued: October 24, 2019
DEPARTMENT OF JUSTICE, U.S. MARSHALS)	
SERVICE, Tulsa, OK, Employer)	
)	

Appearances:
Christopher Kannady, Esq., for the appellant¹
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 December 10, 2018 appellant, through counsel, filed a timely appeal from a September 14, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (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 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 her burden of proof to establish an injury in the performance of duty on October 19, 2015, as alleged.

FACTUAL HISTORY

On December 4, 2015 appellant, then a 47-year-old budget analyst, filed a traumatic injury claim (Form CA-1) alleging that on October 19, 2015 she sustained neck and back spasms, and numbness due to daily computer and desk work while in the performance of duty.⁴ She did not stop work. Appellant's supervisor checked a box marked "yes" on the claim form indicating that her knowledge of the facts of this alleged injury agreed with the statements of the employee and/or witnesses. She also checked a box marked "yes" affirming that the injury occurred in the performance of duty.

In a November 9, 2015 report, Dr. Traci L. White, a Board-certified anesthesiologist and pain medicine specialist, detailed examination findings and diagnosed chronic pain syndrome, cervical radiculitis, cervical and lumbar spondylosis, post-laminectomy cervical spine syndrome, and lumbar degenerative disc disease. Appellant related having continuing neck pain radiating into her shoulders and thoracic muscle spasms.

In reports dated November 19 and December 2, 2015, Dr. Kalvin White, an osteopathic physician specializing in pain medicine and anesthesiology, diagnosed low back pain and lumbar spondylosis. Appellant underwent bilateral L4-5 medial branch blocks on December 2, 2015.

In a development letter dated December 30, 2015, OWCP informed appellant that her claim had initially been adjudicated as a minor injury, but was now reopened for consideration of the merits. It requested that she respond to an attached factual development questionnaire and provide additional medical evidence to establish that she sustained a diagnosed condition as a result of the alleged employment incident. OWCP afforded appellant 30 days to submit the necessary evidence. No response was received.

By decision dated February 1, 2016, OWCP denied appellant's claim finding that she had not established that she was in the performance of duty at the time of the alleged October 19, 2015 employment incident. It noted that her description of the injury was vague and she had not responded to the development letter or completed the questionnaire. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On November 15, 2016 appellant requested reconsideration and submitted an October 16, 2016 report from Dr. John W. Ellis, a Board-certified family medical practitioner.

In his October 16, 2016 report, Dr. Ellis related that on October 19, 2015 appellant was working at her supervisor's desk when she developed severe mid and lower level back pain. Due

⁴ The record reflects that appellant has a November 10, 2008 occupational disease claim (Form CA-2) which was accepted in OWCP File No. xxxxx049 for brachial neuritis or radiculitis, ulnar nerve lesion, cervical spondylosis without myelopathy, and cervical intervertebral disc degeneration. By decision dated June 1, 2016, OWCP accepted her claim for a recurrence of disability beginning October 10, 2015.

to the severity of her back pain and inability to walk, appellant left work. Dr. Ellis reviewed appellant's medical history and provided physical examination findings. He diagnosed bilateral L5 and S1 spinal nerve impairments, which he attributed to the alleged October 19, 2015 employment injury. Dr. Ellis opined that the diagnosed conditions, on a more probable than not basis, had been caused or aggravated by employment factors and work duties. He explained that abnormal stresses such as twisting her back over the course of several years opened up her low back facet joints and placed greater stress on the disc annular fibers and iliolumbar ligaments. Dr. Ellis reported that when appellant reached forward and slightly twisted while sitting at the desk on October 19, 2015 this movement caused severe acute iliolumbar and sacroiliac ligament and annular disc fiber strain. According to him, the incident may have caused immediate radiculopathy, which went unnoticed until the following day when appellant experienced bilateral leg pain and radiculopathy. Dr. Ellis reviewed a lumbar spine MRI scan, which showed no acute herniated discs, but opined it did not rule out annular fiber injury. A review of an electromyography/nerve conduction velocity study (EMG/NCV) was negative for cervical and lumbar radiculopathy, but Dr. Ellis noted that the study did not rule out spinal impingement. Dr. Ellis concluded that appellant sustained lumbar and thoracic muscle, ligament, and disc strains due to the acute October 19, 2015 employment injury.

By decision dated February 9, 2017, OWCP denied modification of its prior decision finding that appellant had not met her burden of proof to establish the factual portion of her claim. It found that she had not provided a statement responding to the development letter and questionnaire.

In March 23, 2017 report, Dr. Ellis diagnosed back muscle tendon strain, lumbar disc derangement, right L4 and L5 spinal nerve impairment, right L4 nerve impairment, and left L5-S1 spinal nerve impairment. He opined that the diagnosed conditions had been caused, aggravated, or contributed to by her work duties and employment factors. Dr. Ellis noted that appellant developed severe back pain on October 19, 2015 while sitting at a desk, reaching forward and slightly twisting. He opined that appellant had been totally disabled since October 19, 2015 due to the injury sustained that day.

On April 17, 2017 appellant, through counsel, requested reconsideration. In an accompanying March 28, 2017 supplemental statement, she clarified that she was claiming a traumatic injury and not an occupational disease. Appellant explained that she was working on budget files in her supervisor's office on October 19, 2015, which required passing the files back and forth across the desk. While leaning forward to reach for a file with a slight left twist, she felt a sudden severe mid-to-low back pain. She noted that she was unable to walk without excruciating pain. Appellant left work after the incident, took medication, and rested. Due to the severity of the pain, she went to urgent care on October 23, 2015 and received a cortisone shot.

By decision dated August 14, 2017, OWCP granted modification of its prior decision finding that the evidence submitted was sufficient to establish the factual portion of her claim. However, it found the medical evidence was insufficient to establish a causal relationship between the accepted October 19, 2015 employment incident and the diagnosed medical conditions.

In a September 11, 2017 report, Dr. Ellis noted that on October 19, 2015 appellant was sitting in her supervisor's office at a standard desk while she and her supervisor passed files back and forth across the desk. Appellant related feeling severe mid-to-low back pain from leaning

forward and twisting her back. Dr. Ellis summarized appellant's diagnoses and related that his opinion regarding causal relationship was unchanged from his prior reports. He also opined that the October 19, 2015 employment incident aggravated her accepted cervical conditions. In a December 4, 2017 report, Dr. Ellis reiterated findings, diagnoses, and opinions from his prior reports.

On April 17, 2018 appellant, through counsel, requested reconsideration.

By decision dated September 14, 2018, OWCP modified its prior decision, and found that appellant failed to establish the factual portion of her claim. Specifically, it found that she failed to establish that the injury occurred in the manner, time, or place alleged.

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 period 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

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 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.¹⁰ 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.¹¹

⁵ *Supra* note 2.

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 *C.B.*, Docket No. 18-0071 (issued May 13, 2019); *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); *T.H.*, 59 ECAB 388, 393-94 (2008).

⁹ *A.C.*, Docket No. 18-1567 (issued April 9, 2019); *Gregory J. Reser*, 57 ECAB 277 (2005).

¹⁰ *A.C., id.*; *Joseph H. Surgener*, 42 ECAB 541, 547 (1991).

¹¹ *A.C., supra* note 9; *Betty J. Smith*, 54 ECAB 174 (2002).

ANALYSIS

The Board finds that appellant has met her burden of proof to establish an injury in the performance of duty on October 19, 2015, as alleged.

While appellant initially provided a vague description of her alleged October 19, 2015 employment incident, in a March 28, 2017 supplemental statement appellant responded to OWCP's development letter and clarified that she had sustained a traumatic incident on October 19, 2015 when she was working on budget files in her supervisor's office. She explained that this work required passing the files back and forth across the desk to her supervisor. Appellant further explained that, while leaning forward to reach for a file with a slight left twist, she felt a sudden, severe mid-to-low back pain.

The Board finds that appellant's description of the incident in her March 28, 2017 statement is sufficient to establish that the October 19, 2015 employment incident occurred at the time, place, and in the manner alleged. Appellant provided a singular account of the mechanism of injury that has not been refuted by any evidence in the record.¹² Appellant's supervisor indicated that her knowledge of the facts of the case corresponded with appellant's statements. The medical evidence of record also substantiated her description of the October 19, 2015 incident. In reports dated October 16, 2016, March 23, September 11, and December 4, 2017, Dr. Ellis reported that an incident occurred on October 19, 2015 when appellant was sitting at the desk in her supervisor's office and passing files back and forth across the desk to her supervisor. As noted above, a claimant's statement that an incident 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.¹³ There is no contradictory evidence of record. The Board finds, therefore, that appellant has established that the October 19, 2015 employment incident occurred in the performance of duty, as alleged.

As appellant has established that the October 19, 2015 employment incident factually occurred, the question becomes whether this accepted employment incident caused an injury.¹⁴ The Board will, therefore, set aside OWCP's September 14, 2018 decision and remand the case to be administratively combined with OWCP File No. xxxxxx049 to be followed by 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 an injury or medical condition causally related to the accepted employment incident and any attendant disability.

¹² See *S.W.*, Docket No. 17-0261 (issued May 24, 2017) (the Board found that OWCP improperly determined that the alleged employment incident did not occur when appellant provided consistent accounts of the claimed incident and there was no evidence to refute her detailed description); see also *C.M.*, Docket No. 19-0009 (issued May 24, 2019); *J.L.*, Docket No. 17-1712 (issued February 12, 2018).

¹³ *A.C.*, *supra* note 9; *Gregory J. Reser*, 57 ECAB 277 (2005).

¹⁴ See *C.M. supra* note 12; *Willie J. Clements*, 43 ECAB 244 (1991).

CONCLUSION

The Board finds that appellant has met her burden of proof to establish an injury in the performance of duty on October 19, 2015, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the September 14, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: October 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