

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

C.W., Appellant)

and)

DEPARTMENT OF DEFENSE, DEFENSE)
COMMISSARY AGENCY, Fort Benning, GA,)
Employer)

**Docket No. 19-0754
Issued: October 2, 2019**

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

ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 22, 2019 appellant filed a timely appeal from an October 17, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 following the October 17, 2018 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 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 August 12, 2018 as alleged.

FACTUAL HISTORY

On August 13, 2018 appellant, then a 32-year-old commissary employee, filed a traumatic injury claim (Form CA-1) alleging that on August 12, 2018 at 9:00 a.m. she pulled a muscle in her arm when moving bags of potatoes and onions off of pallets while in the performance of duty. She noted that the pulled muscle was putting a strain on the nerves in her neck and upper back. On the reverse side of the claim form, the employing establishment checked the box marked “yes” in response to the questions “was employee injured in the performance of duty” and “does the knowledge of the facts about this injury agree with the statements of the employee and/or witnesses?” The employing establishment also indicated that appellant first received medical treatment on August 13, 2018, stopped work on August 18, 2018, and returned to work on August 20, 2018.

OWCP received a certificate from the United States Army Medical Department dated August 13, 2018 certifying that appellant was seen at a hospital on August 13, 2018. The certificate noted that Heather Bolden, a nurse practitioner, recommended that appellant could return to work on August 20, 2018 and was medically excused from work from August 13 through 19, 2018. Ms. Bolden documented that appellant experienced back, neck, and shoulder pain.

OWCP received another certificate from the United States Army Medical Department, dated August 17, 2018, by Ms. Bolden which certified that appellant was seen on August 17, 2018 at a hospital and that she was medically excused from work from August 20 until 26, 2018. Appellant submitted another certificate dated August 22, 2018 by Ms. Bolden certifying that appellant was seen at a hospital on August 22, 2018. Ms. Bolden noted that appellant could return to work on September 17, 2018 and was medically excused from work from August 27 through September 16, 2018. OWCP also received a list of appellant’s six scheduled physical therapy appointments, which ranged from August 22 to September 11, 2018.

In an August 27, 2018 claim development letter, OWCP advised appellant that additional evidence was required to support her claim for compensation benefits. It attached a questionnaire setting forth questions regarding the factual basis of her claim. OWCP also explained that the medical evidence to date was only signed by a care provider who did not qualify as a physician, and requested that appellant submit a comprehensive narrative medical report from a qualified physician that included a diagnosis and an opinion, supported by medical rationale, addressing how the claimed employment incident caused or aggravated a medical condition and attached a questionnaire for her completion. It afforded her 30 days to submit the requested evidence.

OWCP subsequently received a note by Ms. Bolden dated September 25, 2018, certifying that appellant was seen on September 25, 2018 at a hospital and could return to work on September 26, 2018. Ms. Bolden indicated that appellant should avoid lifting more than 35 pounds

because of recent left shoulder pain and strain, and that appellant's physical therapist agreed with this recommendation.

By decision dated October 17, 2018, OWCP denied appellant's claim, as the factual evidence of record was insufficient to establish that the alleged incident occurred as described. It noted that she had not responded to OWCP's questionnaire, which was issued in order to help appellant establish the factual elements of her claim. 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 FECA³ has the burden of establishing 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,⁴ 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.⁵ 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.⁶

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.⁷ 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.⁸ Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.⁹

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 subsequent course of action.¹⁰

³ *Supra* note 1.

⁴ *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).

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

⁶ *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).

⁷ *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).

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

⁹ *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.

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

The employee has not met her burden of proof in establishing the occurrence of an injury when there are 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 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.¹¹

ANALYSIS

The Board finds that appellant has met her burden of proof to establish that the August 12, 2018 incident occurred, as alleged.

On her claim form, appellant indicated that on August 12, 2018 at 9:00 a.m. while she was lifting bags when she was breaking down pallets with cases of 10-pound bags of potatoes and onions she felt pain in her shoulder, back, and neck. She claimed that she pulled a muscle in her arm, straining a nerve in her neck and upper back. The employing establishment confirmed her mechanism of injury.

Appellant provided a singular account of the mechanism of injury that has not been refuted by any evidence in the record.¹² Her actions surrounding the incident corroborate her description, as she sought treatment on August 13, 2018, the day after her alleged injury, presenting with back, neck, and shoulder pain and continued treatment in the next month and a half, and the medical records from her September 25, 2018 note recent shoulder strain and shoulder pain.

As noted above, a claimant'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.¹³ The Board therefore finds that appellant's description in her traumatic injury claim, her employing establishment's affirmation of her description, and her actions surrounding the incident are sufficient to establish that the August 12, 2018 employment incident occurred at the time, place, and in the manner alleged.

As appellant has established that the August 12, 2018 employment incident factually occurred, the issue is thus whether this accepted incident caused an injury.¹⁴ The Board will, therefore, set aside OWCP's October 17, 2018 decision and remand the case for consideration of the medical evidence. Following this and other such further development as may be deemed necessary, OWCP shall issue a *de novo* decision addressing whether appellant has met her burden

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

¹² *A.C.*, Docket No. 18-1567 (issued April 9, 2019).

¹³ *Supra* note 11.

¹⁴ *Supra* note 12.

of proof to establish a diagnosed medical condition causally related to the accepted employment incident.¹⁵

CONCLUSION

The Board finds that appellant has met her burden of proof to establish that the August 12, 2018 employment incident occurred in the performance of duty, as alleged. The Board further finds that the case is not in posture for decision with regard to whether appellant has established an injury causally related to the accepted employment incident.

ORDER

IT IS HEREBY ORDERED THAT the October 17, 2018 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: October 2, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹⁵ *Id.*