

ISSUE

The issue is whether appellant has met his burden of proof to establish an injury in the performance of duty on June 23, 2018, as alleged.

FACTUAL HISTORY

On June 28, 2018 appellant, then a 57-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that on June 23, 2018 he sustained injuries to his neck and right shoulder area assisting a patient while in the performance of duty. He claimed that while he was pulling up the patient's thromboembolic deterrent (TED) socks, the patient pushed down on appellant's head with both hands. Appellant further alleged that another staff member assisted in removing the patient's hands from his neck. On the reverse side of the claim form, appellant's supervisor, J.A., indicated that the employing establishment's investigation of the incident did not support appellant's statement, and that appellant had just returned to full-duty work on April 24, 2018 after a similar injury which had occurred on February 1, 2018.⁴ JA. contended that appellant was dissatisfied with the resolution of his previous claim as appellant believed that, surgery should have been authorized, and consequently, he was claiming a new injury to the same area.

In progress notes dated June 27, 2018, Dr. Bruce K. Eagleson, an emergency medical specialist, reported that appellant presented for a "follow-up appointment" for right-sided neck and shoulder pain, as the previous appointment of June 19, 2018 had been cancelled because appellant failed to attend. He noted that, the original complaint of March 21, 2018 was for a right-sided neck and shoulder pain that radiated distally into the triceps-area and had recurred since a "previous injury [when appellant] 'jammed head on trapeze' on floor 3/2017[, appellant was] seen in [the emergency department.]" Dr. Eagleson notes a description of a new injury occurring on June 23, 2018 at 5:45 a.m. when appellant was attempting to put an TED hose on a demented patient who pushed down on appellant's head, flexing his neck resulting in immediate pain in the neck with numbness, and tingling in the right shoulder and arm. On physical examination he found limited range of motion in the neck and shoulder. In his review of prior imaging reports, Dr. Eagleson noted that a February 22, 2018 diagnostic study on appellant's right shoulder found normal bone mineral density without fracture or dislocation, and mild-to-moderate degenerative changes at the right acromioclavicular joint. A cervical spine report from March 2017 revealed multilevel mild cervical spine degenerative changes. Dr. Eagleson recommended light-duty work.

In a July 11, 2018 development letter, OWCP requested that appellant submit additional evidence in support of his claim. It advised him of the type of factual and medical evidence needed and provided a questionnaire for his completion, which was required to substantiate the factual elements of his claim. The questionnaire inquired as to the circumstances of the prior injury mentioned by the employing establishment and requested that appellant send records of all prior treatment. OWCP also requested that he provide a narrative report from his attending physician, to include a diagnosis and an explanation as to how the reported work incident either caused or aggravated a medical condition. It afforded appellant 30 days to submit the requested information.

⁴ Appellant previously filed a traumatic injury claim for a neck/shoulder injury that allegedly occurred on February 1, 2018. OWCP assigned the claim OWCP File No. xxxxxx535. Appellant's claims have not been administratively combined.

In a July 6, 2018 progress note, Dr. Matthew Torres, a Board-certified family practitioner, related that appellant presented for cervical and thoracic pain. He provided findings on physical examination and noted review of an April 3, 2018 cervical spine magnetic resonance imaging (MRI) scan. Dr. Torres noted that the thoracic spine findings on the MRI scan were “unrelated to the work injury.” He diagnosed neck pain and an abnormal MRI scan, and ordered a follow-up MRI scan of the thoracic spine.

In a July 18, 2018 follow-up report, Dr. Christopher Kager, a Board-certified neurosurgeon, noted that appellant presented for a surgical evaluation regarding neck and radiating right shoulder pain. He indicated that appellant had an initial work-related injury in 2016 when he stood up while helping a patient and hit his head on the bar of the bed. Dr. Kager explained that, a month prior, appellant had another episode where a patient pushed appellant’s head down aggressively and he thereafter felt increased symptoms. He noted that appellant had been through recent shoulder issues and also had two cervical injections with minimal relief. Dr. Kager reported his interpretation of the April 2018 cervical spine MRI scan. He opined that, “[a]lthough it is impossible to say with certainty, I do believe [that appellant’s cervical spine condition] is related to his work-related incident[s] as he describes them, and he may require an IME [(independent medical examiner)] on [OWCP’s] part.”

By decision dated August 16, 2018, OWCP denied appellant’s traumatic injury claim finding that the evidence of record was insufficient to establish that the June 23, 2018 incident occurred as alleged. It noted that the claim was contested and he had not responded to its request for information.

On September 24, 2018 appellant requested reconsideration of the August 16, 2018 decision.

In a work restriction note dated June 26, 2018, Dr. Eagleson restricted appellant from patient care duties, lifting over five pounds with the right hand, and indicated he could perform no driving duty, no overhead work, and no work involving ladders.

In an October 10, 2018 note, Dr. Kager recommended a C3-6 cervical discectomy with fusion and plating, and diagnosed cervical disc disorder with radiculopathy of the mid-cervical region. He reported that surgery was scheduled for October 16, 2018 and that appellant would be off work for six weeks following surgery.

By decision dated December 20, 2018, OWCP denied modification of the August 16, 2018 decision finding that appellant had not responded to its request for information from the initial development letter.

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

⁵ *Supra* note 2.

time limitation 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

To determine if an employee sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established.⁹ 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 allegedly occurred.¹⁰ The second component is whether the employment incident caused a personal injury.¹¹

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 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.¹³ An employee has not met his or her burden of proof of establishing the employment incident when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.¹⁴

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish an injury in the performance of duty on June 23, 2018, as alleged.

Following the filing of the present claim, in a development letter dated July 11, 2018, OWCP notified appellant that completion of a questionnaire was needed to substantiate the factual basis for his claim. The questionnaire inquired as to the circumstances of the prior injury noted by the employing establishment and requested treatment records from that injury. Appellant did not respond to the questionnaire and failed to provide a narrative statement detailing the alleged

⁶ *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).

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

⁸ *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).

⁹ *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *T.H.*, 59 ECAB 388, 393-94 (2008).

¹⁰ *L.T.*, Docket No. 18-1603 (issued February 21, 2019); *Elaine Pendleton*, 40 ECAB 1143 (1989).

¹¹ *B.M.*, Docket No. 17-0796 (issued July 5, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

¹² *L.A.*, Docket No. 17-0138 (issued April 5, 2017); *D.B.*, 58 ECAB 529 (2007); *Gregory J. Reser*, 57 ECAB 277 (2005).

¹³ *L.A.*, *id.*

¹⁴ *Id.*

traumatic incident(s) or refute the allegations of the employing establishment. The record contains persuasive evidence of prior, nonwork injuries as well as a prior employment injury claim. As appellant has not responded to the factual development inquiries following the filing of the present claim and because there is serious disagreement raised by his supervisor on the claim form, the Board finds that appellant has not met his burden of proof to establish that he was injured in the performance of duty as alleged.¹⁵

As appellant did not establish that, the incident occurred as alleged, the Board need not address the medical evidence of record or the issue of causal relationship.¹⁶

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 23, 2018 as alleged.

ORDER

IT IS HEREBY ORDERED THAT the December 20, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 4, 2019
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

¹⁵ *D.A.*, Docket No. 18-1715 (issued May 24, 2019); *M.F.*, Docket No. 18-1162 (issued April 9, 2019).

¹⁶ *K.M.*, Docket No. 19-0367 (issued June 26, 2019).