United States Department of Labor
Employees' Compensation Appeals Board

M.L., Appellant	)	
and	)	**Docket No. 19-0909**
	)	**Issued: September 17, 2019**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, San Bernardino, CA, Employer	)	

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 March 26, 2019 appellant filed a timely appeal from a January 9, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 January 9, 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 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 November 29, 2018, as alleged.

FACTUAL HISTORY

On December 3, 2018 appellant, then a 32-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that she injured her lower back on November 29, 2018 at 2:30 a.m. when using a pallet jack and felt a "pop" in her back while in the performance of duty. On the reverse side of the claim form, the employing establishment indicated that she stopped work on November 29, 2018, and returned on December 3, 2018.

In a work status report dated November 29, 2018, Kim Bennett, a physician assistant, placed appellant off work from November 29 to 30, 2018, and noted that appellant was deemed able to return to work at full capacity on December 1, 2018.

In a December 3, 2018 statement, appellant's supervisor, L.C., recounted that, on November 28, 2018, she informed appellant that she would need to see her in the Supervisor Distribution Operations office to issue appellant a seven-day suspension. At that point, appellant informed L.C. that her back was "acting up" and that she would need to go home. In response, L.C. indicated that to clear anyone leaving, she would need to speak with the manager of distribution operations, D.J. According to L.C., appellant responded, "so this is how we are going to play this," and notified L.C. that she was going to go to the doctor the following day in order to be excused from work. D.J. then cleared appellant to go home, and thereafter L.C. issued the seven-day suspension. L.C. noted that appellant clocked out and went home at 1:53 a.m. on November 29, 2018.

In a December 3, 2018 statement, appellant explained that, on November 29, 2018, she was loading dumpers one and two, and while loading a large box onto a wooden pallet, the pallet became stuck. While pulling it out, "she heard her back crack and it hurt." At 2:30 a.m., appellant went to stretch and her back continued to hurt. She further explained that, "when I returned to work Monday, it got worse and by Wednesday, I couldn't work anymore" and she asked to see a doctor, but was instead sent home when she told her supervisors that she was reporting the incident as a work injury. Appellant indicated that she reported the injury as a work injury on December 3, 2018.

In a December 4, 2018 statement, the assistant manager of distribution operations, R.M., reiterated the content of supervisor L.C.'s statement of December 3, 2018. He added that appellant reported back to work on December 3, 2018 at 7:50 p.m. with a work-excuse note for November 29 through 30, 2018, and was deemed capable to return to work full duty on December 1, 2018. On December 3, 2018 appellant had informed her supervisor that she had an accident on November 29, 2018. She was brought into the Supervisor Distribution Operations office to file a claim and was sent to be treated. After reviewing appellant's written statement, R.M. noted that her statement contradicted the events on the day of her alleged incident. He pointed out that appellant stated that the accident had occurred about 2:30 a.m., but she had already clocked out by that time. R.M. also noted that appellant claimed that she returned to work on Monday, it got

worse and "by Wednesday, she couldn't work any longer." However, R.M. stated that the date of the alleged injury was November 29, 2018, a Thursday morning.[3]

In a work status report dated December 4, 2018, Hector Veron, a physician assistant, indicated that appellant could return to work on December 4, 2018 with restrictions on any overhead work and a lifting limit of 10 pounds. In an accompanying duty status report (Form CA-17), he diagnosed a lumbar sprain/spasm.

In a December 6, 2018 statement, a human resources representative from the employing establishment indicated that on Wednesday, November 28, 2018, appellant was informed that she was about to be issued a seven-day suspension for failure to maintain regular attendance and for being absent without leave. Appellant reported to work on November 28, 2018 at 7:50 p.m. and clocked out on November 29, 2018 at 1:53 a.m. The human resources representative noted that appellant informed her supervisor that she was injured at 2:30 a.m. on November 29, 2018, but that she had left work to go home at that time.

On December 7, 2018 the employing establishment submitted a copy of the seven-day suspension order for unscheduled and unexcused absences for three consecutive days from October 31 through November 2, 2018. The suspension notice stated that appellant's reason for her absence without leave was a work-excuse note from her doctor that kept her off work from October 31 to November 4, 2018, which she provided to the employing establishment after her absence on November 5, 2018. The employing establishment found this explanation unacceptable because appellant had not notified management of her inability to work. The notice was issued to appellant on November 29, 2018, which she dated, but refused to sign.

In a December 13, 2018 development letter, OWCP requested that appellant submit additional evidence in support of her claim. It advised her of the type of factual and medical evidence needed and provided a questionnaire for her completion, which was required to substantiate the factual elements of her claim. The questionnaire inquired as to the circumstances of the injury, whether there had been prior similar injuries, and whether there were witnesses who could confirm her injury. OWCP also requested that appellant provide a narrative report from her attending physician, to include a diagnosis and an explanation as to how the reported work incident either caused or aggravated a medical condition. Finally, it attached the controversion letters and the suspension from the employing establishment. Appellant was afforded 30 days to submit the requested information.

Subsequent to the development letter, appellant submitted a December 11, 2018 Form CA-17, which included a diagnosis of a lumbar spasm and noted lifting restrictions of 10 pounds or less. The Form CA-17 was signed by a provider with an illegible signature.

In a report dated December 11, 2018, Dr. Jung Jin Lee, a Board-certified internist, issued restrictions on appellant's lifting and activity, and limited work to eight hours per day.

[3] Although R.M. stated that the clock rings for November 28 and 29, 2018 were included with his statement, this document is not in the record.

In a medical report dated December 26, 2018, Dr. Lee remarked that appellant's job responsibilities included lifting, pushing, pulling, and upper extremity repetitive work. He reported that appellant indicated that, on November 29, 2018, "she was trying to pull the pellet [sic] jack that got stuck due to broken pellet [sic] that reportedly weighed about 50 pounds and immediately noticed lower back pain." After a physical examination, Dr. Lee diagnosed a lumbar sprain.

By decision dated January 9, 2019, OWCP denied appellant's traumatic injury claim finding that the evidence of record was insufficient to establish that the November 29, 2018 incident occurred as alleged. It noted that she failed to respond to the questionnaire attached to the development letter, which included the controversion letters submitted by the employing establishment.

LEGAL PRECEDENT

An employee seeking benefits under FECA[4] 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,[5] 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.[6] 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.[7]

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.[8] 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.[9] 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.[10] The second component is whether the employment incident caused a personal injury.[11] An employee may establish that an injury occurred in the performance of duty

[4] *Supra* note 2.

[5] *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).

[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] *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).

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

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

[10] *L.A.*, Docket No. 17-0138 (issued April 5, 2017).

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

as alleged, but fail to establish that the disability or specific condition for which compensation is being claimed is causally related to the injury.[12]

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish an injury in the performance of duty on November 29, 2018, as alleged.

On her Form CA-1, appellant alleged that she injured her lower back on November 29, 2018 at 2:30 a.m., when she was using a pallet jack and felt a pop in her back. In a December 3, 2018 statement from appellant, she recounted that, on November 29, 2018, she was loading dumpers one and two, and while loading a large box onto a wooden pallet, the pallet became stuck. When appellant was pulling it out, "she heard her back crack and it hurt." At 2:30 a.m., she went to stretch and her back continued to hurt. Appellant wrote that, "when I returned to work Monday, it got worse and by Wednesday, I couldn't work anymore" and she asked to see a doctor, but was instead sent home when she told her supervisors that she was reporting the incident as a work injury.

The employing establishment, including appellant's supervisor, submitted consistent statements that appellant was not at work on 2:30 a.m. on November 29, 2018, as she had clocked out at 1:53 a.m. on that day after receiving a suspension notice. The suspension notice indicated that, from October 31 to November 1, 2018, appellant was absent without leave, and although she proffered a work-excuse note after the fact, she had not informed her supervisors before or during the period of absence. When L.C. informed appellant that there would be a meeting to discuss the suspension, L.C., supervisor, and R.M., assistant manager of distribution operations, related that appellant responded, "so that's how you want to play this?" and informed L.C. that she should expect that appellant's doctor would issue another work-excuse note.

In a development letter dated December 13, 2018, OWCP notified appellant that completion of the questionnaire was needed to substantiate the factual basis for her claim. As she has not responded to the request for factual information, the Board finds that the record lacks sufficient factual evidence to establish specific details of how the claimed injury occurred.[13] Moreover, when an employing establishment makes a detailed allegation of duplicity on the part of a claimant with regard to the claim and supports the allegation with some documentary evidence contradicting the claim, the failure to object to such allegations when presented with an opportunity to do so casts doubt on a claimant's statements of fact.[14] Absent supporting evidence from appellant, as was requested in the development questionnaire, it cannot be determined that the incident occurred as alleged.[15]

[12] *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *L.T.*, Docket No. 18-1603 (issued February 21, 2019); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

[13] *M.S.*, Docket No. 18-0059 (issued June 12, 2019).

[14] *See id*.

[15] *H.O.*, Docket No. 17-1176 (issued November 27, 2018).

Without adequate evidence from appellant, the Board finds that the medical evidence offers insufficient support to establish the factual component of fact of injury.[16] The only medical evidence mentioning the claimed event is Dr. Lee's report of December 26, 2018. Dr. Lee reported that appellant indicated that, on November 29, 2018, "she was trying to pull the pellet [sic] jack that got stuck due to broken pellet [sic] that reportedly weighed about 50 pounds and immediately noticed lower back pain." The Board has held that a vague recitation of the facts does not support an allegation that a specific event occurred and caused a work-related injury.[17] A single, non-contemporaneous medical report which merely records appellant's own statements is insufficient to establish that the specific incident occurred in the time, place, and manner alleged.[18]

Finally, the Board has held that an employee has not met his or her burden of proof to establish the occurrence of an event when inconsistencies in the evidence cast serious doubt upon the validity of the claim.[19] Here, the evidence strongly suggests that appellant went home before 2:30 a.m. on November 29, 2018. Evidence that the claimant was not working at the time of the alleged injury presents a serious contradiction of her factual account of the employment incident.[20]

As such, the Board finds appellant has not met her burden of proof to establish the factual component of fact of injury. Therefore, the Board need not address the medical component of fact of injury or causal relationship.[21]

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 her burden of proof to establish an injury in the performance of duty on November 29, 2018 as alleged.

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

[17] *M.B.*, Docket No. 11-1785 (issued February 15, 2012).

[18] *See also R.R.*, Docket No. 18-1562 (issued February 5, 2019) (a medical report did not warrant timely merit reconsideration because it did no more than "report appellant's beliefs").

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

[20] *Id.*

[21] *Id*.

ORDER

IT IS HEREBY ORDERED THAT the January 9, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 17, 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