

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

S.S., Appellant)	
)	
and)	Docket No. 19-1815
)	Issued: June 26, 2020
DEPARTMENT OF HOMELAND SECURITY,)	
TRANSPORTATION SECURITY)	
ADMINISTRATION, Cleveland, OH, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
CHRISTOPHER J. GODFREY, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 28, 2019 appellant, through counsel, filed a timely appeal from a May 23, 2019 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.

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.*

ISSUE

The issue is whether appellant has met his burden of proof to establish an incident in the performance of duty on August 8, 2018, as alleged.

FACTUAL HISTORY

On September 10, 2018 appellant, then a 60-year-old transportation security specialist, filed a traumatic injury claim (Form CA-1), assigned OWCP File No. xxxxxx332, alleging that on August 8, 2018 he sustained right hip and right buttock injuries when he climbed onto a “CSX engine” to conduct an inspection while in the performance of duty. He noted that he felt a strain in his crotch/groin area and warmth on his buttocks. On the reverse side of the Form CA-1, M.R., appellant’s first-level supervisor, noted that appellant stopped work on August 13, 2018. She checked a box marked “No” indicating that he had not been injured while in the performance of duty. M.R. explained that she did not know for a fact that appellant was injured while in the performance of duty as she was notified on August 13, 2018 that his claimed injury was related to a previous 2013 work injury.³ Appellant then noted that lifting chairs at work may also have aggravated his 2013 work injury. He later indicated on September 8, 2018 that his claimed injury was related to climbing a rail car at work. M.R. further noted that appellant’s Form CA-1 was not filed within 30 days of injury, as she received notification of the injury on September 10, 2018.

In support of his claim, appellant submitted an August 13, 2018 medical report from Dr. Catherine E. Watkins Campbell, an attending Board-certified specialist in occupational and family medicine, who noted his previously accepted employment-related right elbow, right knee, and lumbar conditions. Dr. Watkins Campbell noted that he presented for a flare-up of right low back pain that also involved the right groin and the right hip on the right lateral side. She provided an assessment that she could not clearly identify whether the problem was lumbosacral or hip in origin and further noted that her examination suggested spasm in the iliopsoas muscle and the iliotibial band. Dr. Watkins Campbell ordered a magnetic resonance imaging (MRI) scan of the lumbar spine, right hip, and pelvis to rule out additional lumbar spinal issues related to the previously accepted conditions and specific hip-related conditions. She requested that the acceptance of appellant’s claim be expanded to include additional lumbar conditions.

OWCP thereafter received additional medical reports from Dr. Watkins Campbell. In a September 4, 2018 attending physician’s report (Form CA-20), Dr. Watkins Campbell noted a history of employment injury of stepping onto a train on August 7, 2018. She provided examination findings and diagnosed right hip arthropathy subluxation that aggravated a preexisting right hip condition, and sprain and strain of the right hip. Dr. Watkins Campbell advised that the diagnosed conditions were related to the described employment activity. She also advised that appellant was totally disabled from work from August 13 to October 19, 2018.

³ Appellant has a prior claim for a May 20, 2013 traumatic injury to his right elbow, right knee, and lumbar spine assigned OWCP File No. xxxxxx261. OWCP has accepted the claim for lumbar sprain, right elbow and knee contusions, right knee complex tear of the medial meniscus, aggravation of right knee osteoarthritis/degenerative joint disease, and aggravation of lumbar spondylolisthesis and intervertebral disc degeneration.

Dr. Watkins Campbell, in a September 5, 2018 office visit report, noted the lumbar spine and right hip MRI scan findings. She indicated that appellant had two injury-related events in the same week. The initial right hip and groin pain occurred after appellant stepped onto a train earlier in the week. Then, on Friday of the same week, after lifting heavy chairs, he had an acute exacerbation/aggravation of back pain on the right side most likely at the L4-5 level with resultant acute L4 nerve root pain. Dr. Watkins Campbell opined that the first event of that week, when appellant stepped up on the higher elevated step of the train, was directly related to the onset of his right hip pain and should be considered a new injury. She further opined that the second event of that week, lifting heavy chairs, resulted in a significant increase in right low back and leg pain that would be pursued further under the previously accepted claim related to the May 20, 2013 injury.

OWCP also received additional statements from the employing establishment. In a September 12, 2018 statement, T.O., appellant's coworker, noted that during the first or second week in August 2018 she spoke to appellant about what appeared to her as him favoring one leg while walking. She noted that he acknowledged experiencing pain in his lower back.

In a statement also dated September 12, 2018, M.R. noted that on August 12 and 13, 2018 appellant reported that he would not be at work the following week due to lower back and hip pain. She noted that he had not mentioned anything about climbing a train or that his injury was associated with climbing a train. M.R. noted that she received an August 17, 2018 e-mail in which appellant indicated that early the prior week he had noticed pain in his right upper groin/thigh area that was consistent with his 2013 employment injury and caused him difficulty with walking. Appellant further indicated that T.O. noticed him and asked if something was wrong. He then indicated that late on Friday he received a directive to move chairs up against a file cabinet in preparation for carpet cleaning. It was not until late Friday night that appellant began to experience severe pain in his right hip and shin. On September 10, 2018 M.R. received an e-mail in which appellant indicated that Dr. Watkins-Campbell believed that he tore a ligament and injured his hip while climbing onto a train to conduct an inspection in August 2018.

In an October 4, 2018 letter, L.T., an employing establishment workers' compensation coordinator, noted that on August 17, 2018 appellant initially reported that he aggravated his May 20, 2013 work conditions and was totally disabled as a result of lifting multiple chairs at work on August 10, 2018. Later that evening appellant experienced severe pain in his right hip, shin, and thigh. He also reported that he experienced pain while at work a couple days prior to August 10, 2018 and this was witnessed by T.O. Appellant admitted that he attributed those symptoms to his May 20, 2013 employment injury. L.T. indicated that appellant had not described pain or discomfort during or immediately after lifting the chairs. On September 10, 2018 appellant first mentioned that he sustained a new injury on August 8, 2018 while boarding a train during a rail yard inspection. He indicated that on September 5, 2018 he was seen by his physician who determined that he was injured while climbing onto the train based on the fact that they could not determine any other cause when they went through his work activities for the week of August 10, 2018.

In e-mails between appellant, L.T., and M.R., dated August 23 and September 10, 2018, appellant continued to maintain that he sustained a right hip condition causally related to the alleged August 8, 2018 employment incident based on Dr. Watkins Campbell's opinion.

OWCP, in an October 9, 2018 development letter, advised appellant that the evidence of record was insufficient to establish that he actually experienced the incident alleged to have caused his injury on August 8, 2018 and requested that he respond to an attached questionnaire. It also requested medical evidence in support of his claim. OWCP afforded appellant 30 days to respond.

OWCP continued to receive medical evidence, including an October 10, 2018 Form CA-20 report from Dr. Watkins Campbell. Dr. Watkins Campbell reiterated appellant's alleged history of injury on August 8, 2018 and her opinion that his diagnosed right hip arthropathy subluxation which aggravated preexisting right hip condition, and sprain and strain of the right hip were related to the described employment activity. She advised that appellant was totally disabled from work for the period August 13 to December 24, 2018.

In a September 12, 2018 letter, Dr. John E. Feighan, a Board-certified orthopedic surgeon, noted that appellant had returned for a new injury. He noted that, in August 2018, appellant injured his right hip when he twisted his right leg and hip while climbing on a train at work. Appellant felt pain in the groin and buttocks and several days later, he again felt sharp pain down his right leg and hip and in the groin while lifting at work. Dr. Feighan discussed examination findings and diagnosed hip sprain and primary localized osteoarthritis of the hip.

OWCP, by decision dated November 18, 2018, denied appellant's traumatic injury claim finding that the factual component of fact of injury was not established due to inconsistencies in the descriptions of how the claimed injury occurred. Additionally, it noted that he had not responded to the October 9, 2018 development questionnaire. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On November 27, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

OWCP thereafter received a December 17, 2018 memorandum in which M.R. requested that appellant clarify his current duty status by submitting medical documentation regarding which conditions were the basis of his absence from work since August 10, 2018. She noted that he had claimed an aggravation of his accepted employment conditions under OWCP File No. xxxxxx261 due to lifting chairs at work on August 10, 2018 and a new work-related injury on August 8, 2018 while conducting an inspection.

In an October 11, 2018 report, Dr. Nicholas U. Ahn, a Board-certified orthopedic surgeon, noted a history of injury that appellant developed back pain and thigh discomfort after climbing on board a train while working as an inspector in August 2018. He reported that appellant also had known hip and knee problems and lumbar derangement. Dr. Ahn provided examination findings and diagnosed spondylosis of the lumbar region.

Dr. Watkins Campbell, in reports dated December 26, 2018 and January 3, 2019 listed a date of injury as August 8, 2018 and noted that appellant injured his right hip while climbing onto a "CSX" train to conduct an inspection. She provided new diagnoses of right hip sprain/strain, right hip labral tear, and substantial aggravation of preexisting right hip arthritis. Dr. Watkins Campbell opined that the diagnosed conditions were causally related to the claimed August 8, 2018 employment incident and recommended that appellant initiate a new claim. In addition, she

again advised that the claimed August 10, 2018 incident resulted in a significant increase in right low back and leg pain that would be pursued under his prior claim for his May 20, 2013 employment injury.

Dr. Watkins Campbell, in an addendum report also dated January 3, 2019, responded to M.R.'s December 17, 2018 memorandum, noting that appellant's condition began on August 8, 2018 and that he had been unable to work since August 13, 2018 due to his back, right knee, and right hip injuries. She advised that he was restricted from his current work duties until February 20, 2019.

During the March 13, 2019 telephonic hearing, appellant testified that there was some hesitancy about where and when his injury occurred, but he was clear that on August 8, 2018 he reinjured or aggravated his 2013 preexisting right hip, right knee, and right elbow conditions. He reiterated his history of injury on August 8, 2018 when he climbed aboard a CSX engine. Appellant claimed that he reported his injury two and a half to three days later to T.O. who questioned why he was limping and he explained to her that it was a result of climbing out of a train to conduct an inspection on August 8, 2018. He also reiterated his history of injury of lifting multiple chairs on August 10, 2018. Appellant believed that both incidents caused his claimed injuries. He also believed that his symptoms were similar to his original injury and that he had reaggravated his original injury. Appellant provided additional details about the required physical activities he performed after climbing onto a train on August 8, 2018 and lifting a chair on August 10, 2018. He noted that he had been off work since August 10, 2018 and had submitted paperwork for regular retirement as of March 31, 2019. Appellant denied having any other injuries or accidents since August 8, 2018. He explained that he only filed a Form CA-1 for his August 8, 2018 right hip injury because he initially thought that his August 10, 2018 injury was a part of his 2013 injury claim, but was later advised to file a Form CA-1 for the August 10, 2018 injury. Appellant noted that he first told T.O. and the assistant federal security director about his hip injury on August 13 or 17, 2018.

On April 15, 2019 L.T. responded to appellant's hearing testimony. She continued to controvert appellant's claim, contending that he had not timely report his claimed August 8, 2018 injury and that his description of his injury conflicted with T.O.'s confirmed statement that he only mentioned lower back pain and not a hip injury, and his own verbal and written correspondence.

By decision dated May 23, 2019, an OWCP hearing representative affirmed the November 18, 2018 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ 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

⁴ *Supra* note 2.

time limitation period 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 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.⁸ Fact of injury consists of two components that must be considered in conjunction with one another. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time and place, and in the manner alleged.⁹ Second, the employee must submit sufficient evidence to establish that the employment incident caused a personal injury.¹⁰

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.¹¹ The employee has not met his or 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.¹² 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.¹³ 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.¹⁴

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

¹¹ *M.F.*, Docket No. 18-1162 (issued April 9, 2019); *Charles B. Ward*, 38 ECAB 667, 67-71 (1987).

¹² *See E.C.*, Docket No. 19-0943 (issued September 23, 2019).

¹³ *See L.B.*, Docket No. 19-1799 (issued March 11, 2020); *M.C.*, Docket No. 18-1278 (issued March 7, 2019); *Betty J. Smith*, 54 ECAB 174 (2002).

¹⁴ *See M.C., id.*; *D.B.*, 58 ECAB 464, 466-67 (2007).

ANALYSIS

The Board finds that appellant has met his burden of proof to establish an incident in the performance of duty on August 8, 2018, as alleged.

Appellant indicated in his September 10, 2018 claim form that he injured his right hip and buttocks on August 8, 2018 while climbing onto a train to conduct an inspection at work. Also, during his March 13, 2019 telephonic hearing, he attributed his claimed right hip injury to lifting multiple chairs at work on August 10, 2018. Additionally, appellant indicated in his claim form that he may have aggravated his accepted May 20, 2013 employment injury because he experienced similar symptoms. He also maintained that he reported his claimed August 8, 2018 injury two and a half to three days later to T.O. Although appellant's supervisor, M.R., along with L.T., maintained that he had not provided notification of his alleged injury until September 10, 2018, she noted that his injury was first reported to her on August 13, 2018. Further, while the employing establishment contended that there is a discrepancy between the body part appellant alleged to have injured and that claimed by T.O., his coworker, the Board notes, however, that T.O. nonetheless supports that appellant was injured in early August 2018. Additionally, as noted above, appellant claimed that he sustained a right hip injury and aggravated his accepted May 20, 2013 employment injury, which includes lumbar conditions, at work in August 2018. Moreover, Dr. Watkins Campbell's contemporaneous August 13, 2018 report indicated that appellant presented with a flare-up of right low back pain that involved the right groin and right hip and her subsequent reports provided a consistent history of employment injury on August 8¹⁵ and 10, 2018, noted clinical findings, and diagnosed right hip arthropathy subluxation that aggravated his preexisting right hip arthritis and accepted May 20, 2013 employment injury, sprain and strain of the right hip, and right hip labral tear as a result of the described work incidents. Additionally, Dr. Feighan's September 12, 2018 letter and Dr. Ahn's October 11, 2018 report related a consistent history of injury on August 8, 2018.

The Board thus finds that, based on appellant's statements and hearing testimony, the medical evidence of record, and T.O.'s statement, he has met his burden of proof to establish that the August 8, 2018 employment incident occurred in the performance of duty, as alleged.

As appellant has established that the August 8, 2018 employment incident factually occurred, the question becomes whether this incident caused an injury or aggravated his previously accepted May 20, 2013 employment injury assigned OWCP File No. xxxxxx261.¹⁶ The Board will, therefore, remand the case for OWCP to consider the medical evidence of record on the issue of causal relationship between the accepted August 8, 2018 employment incident and his diagnosed conditions. Furthermore, on remand, OWCP should administratively combine OWCP File No. xxxxxx261 with the current claim. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

¹⁵ The Board notes that, while Dr. Watkins Campbell initially listed the date of injury as August 7, 2018 rather than August 8, 2018, she later submitted reports discussed *infra*, in which she accurately described the incident as occurring on August 8, 2018 as alleged by appellant.

¹⁶ See *M.A.*, Docket No. 19-0616 (issued April 10, 2020); *C.M.*, Docket No. 19-0009 (issued May 24, 2019).

CONCLUSION

The Board finds that appellant has met his burden of proof to establish an incident in the performance of duty on August 8, 2018, as alleged. The case is not in posture for decision, however, with regard to whether he has established an injury causally related to the accepted August 8, 2018 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the May 23, 2019 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: June 26, 2020
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board