United States Department of Labor
Employees' Compensation Appeals Board

E.S., Appellant	)	
and	)	**Docket No. 22-0209**
	)	**Issued: July 14, 2022**
DEPARTMENT OF THE NAVY, MARINE CORPS LOGISTICS BASE, Albany, GA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On November 23, 2021 appellant filed a timely appeal from an October 25, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act (FECA)[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.[2]

[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that, following the October 25, 2021 decision, appellant submitted additional evidence to OWCP. 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 his burden of proof to establish a traumatic injury in the performance of duty on September 1, 2021, as alleged.

FACTUAL HISTORY

On September 9, 2021 appellant, then a 53-year-old heavy mobile equipment mechanic, filed a traumatic injury claim (Form CA-1) alleging that on September 1, 2021 he sustained a back injury with numbness in his lower extremities when tightening the tow eye bolts on the front of an amphibious assault vehicle while in the performance of duty. On the reverse of the claim form S.F., an employing establishment supervisor, answered questions "Yes" indicating that appellant had been injured in the performance of duty and that her knowledge of the facts about the claimed injury agreed with the statements of appellant and/or witnesses. She noted that appellant had a history of back pain and had undergone lumbar surgery.

In a September 1, 2021 hospital emergency department report, Dr. Edwin J. Fortenberry, Board-certified in internal medicine, diagnostic radiology, and nuclear medicine, noted that appellant presented with right-sided lower back pain and right lower extremity numbness, which began at work when he experienced a popping sensation in his low back while torquing a large bolt. He noted a history of lumbar surgery. On examination Dr. Fortenberry observed right sciatic notch tenderness, midline lumbar surgical scarring, and tenderness to palpation at the surgical scar into the right paraspinous. A computerized tomography (CT) scan of the lumbar spine demonstrated minimal retrolisthesis of L5 on S1, minimal retrolisthesis of L4 on L5, posterior decompression at L5, posterior degenerative facet changes at L4-5 and L5-S1, and degenerative changes with osteophytes in the anterior aspect of the sacroiliac joints, right greater than left. Dr. Michael G. St. Marie, Board-certified in emergency medicine, diagnosed a lumbar strain and prescribed medication.

In a development letter dated September 23, 2021, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of evidence necessary to establish his claim and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence.

In a September 24, 2021 report, Dr. Andrew G. Cordista, a Board-certified orthopedic surgeon, noted that approximately two-and-a-half weeks prior, appellant had an incident while at work where he performed heavy lifting then heard a pop in his lower back and experienced bilateral knee weakness. Since the injury, appellant reportedly had been stumbling and dragging his right foot. Dr. Cordista reviewed the September 1, 2021 lumbar CT scan and noted an L5 laminectomy On October 12, 2021 OWCP received a September 1, 2021 emergency department patient history form indicating that appellant had undergone lumbar spine surgery in 2015.

Dr. Cordista diagnosed lumbar and lumbosacral enesopathy, low back pain, lumbar and lumbosacral spondylosis without myelopathy or radiculopathy, lumbar intervertebral disc degeneration, lumbar radiculopathy, and lumbosacral spinal stenosis. He administered lumbosacral trigger point injections and prescribed medication. Dr. Cordista returned appellant to full-time modified duty with lifting limited to 20 pounds.

On September 24, 2021 appellant returned to full-time modified duty with lifting limited to 20 pounds.

In an October 5, 2021 attending physician's report (Form CA-20), Dr. Cordista noted that on September 1, 2021, while performing heavy lifting at work, appellant heard a pop in his lower back and experienced bilateral knee weakness. He noted appellant's history of chronic low back pain with bilateral foraminal narrowing at L4-5 and L5-S1. Dr. Cordista diagnosed chronic lower back pain, spondylosis, and disc degeneration. He indicated that it was "unknown" if the diagnosed conditions were related to the September 1, 2021 employment incident.

By decision dated October 25, 2021, OWCP denied appellant's traumatic injury claim, finding that the evidence of record was insufficient to establish that the September 1, 2021 employment incident occurred, as alleged. It explained that he did not respond to the factual questionnaire and concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

LEGAL PRECEDENT

An employee seeking benefits under FECA[3] has the burden of proof to establish the essential elements of his or her claim, including 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 first must be determined whether fact of injury has been established. There are two components involved in establishing fact of injury. 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. The second component is whether the employment incident caused a personal injury and can be established only by medical evidence.[7]

[3] *Supra* note 1.

[4] *F.H.*, Docket No. 18-0869 (issued January 29, 2020); *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *Joe D. Cameron*, 41 ECAB 153 (1989).

[5] *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[6] *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[7] *T.H.*, Docket No. 19-0599 (issued January 28, 2020); *K.L.*, Docket No. 18-1029 (issued January 9, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

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 or her subsequent course of action.[8] The employee has not met his or her burden of proof of establishing the occurrence of an injury when there are such 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 serious doubt on an employee's statements in determining whether a case has been established. 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]

ANALYSIS

The Board finds that appellant has met his burden of proof to establish that a traumatic incident occurred in the performance of duty on September 1, 2021, as alleged.

On his Form CA-1 appellant related that on September 1, 2021 he sustained a lumbar injury with bilateral lower extremity numbness while tightening the tow eye bolts on the front of an amphibious assault vehicle. On the reverse side of the claim form, appellant's supervisor answered a question "Yes" supporting that appellant had been injured while in the performance of duty.

Appellant immediately sought treatment with Dr. Fortenberry and Dr. St. Marie, who treated him at a hospital emergency department on September 1, 2021. Both physicians noted that appellant experienced the onset of right-sided low back pain with lower extremity numbness while torquing a large bolt at work that day. Dr. St. Marie diagnosed a lumbar strain and prescribed medication. Additionally, Dr. Cordista noted in his September 24 and October 5, 2021 reports that appellant had experienced the immediate onset of low back pain with lower extremity weakness after performing heavy lifting while at work on September 1, 2021.

Appellant's claim of a September 1, 2021 employment incident has not been refuted by strong or persuasive evidence. He has provided a consistent account of the time, place, and manner of injury, which was confirmed by the employing establishment. There are no discrepancies in the case record regarding appellant's claimed September 1, 2021 employment incident so as to cast serious doubt on the fact that the injury occurred on that date in the manner alleged.[10] The Board, thus, finds that the evidence of record is sufficient to establish that the employment incident occurred in the performance of duty on September 1, 2021 as alleged.

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[8] *See J.M.*, Docket No. 19-1024 (issued October 18, 2019); *M.F.*, Docket No. 18-1162 (issued April 9, 2019).

[9] *N.A.*, Docket No. 21-0773 (issued December 28, 2021); *J.T.*, Docket No. 21-0561 (issued November 22, 2021); *see M.C.*, Docket No. 18-1278 (issued March 7, 2019); *D.B.*, 58 ECAB 464, 466-67 (2007).

[10] *N.A.*, *id.*; *J.T.*, *id.*; *see C.G.*, Docket No. 19-1404 (issued April 14, 2020); *see D.L.*, Docket No. 18-1189 (issued February 15, 2019).

As appellant has established that the September 1, 2021 employment incident factually occurred, the question becomes whether this employment incident caused an injury.

The Board will, therefore, remand the case for consideration of the medical evidence on the issue of causal relationship. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision addressing whether appellant has met his burden of proof to establish an injury causally related to the accepted September 1, 2021 employment incident.[11]

CONCLUSION

The Board finds that appellant has met his burden of proof to establish that a traumatic incident occurred in the performance of duty on September 1, 2021, 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 September 1, 2021 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the October 25, 2021 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: July 14, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board

[11] *Id*.