



## **ISSUES**

The issues are: (1) whether appellant has met his burden of proof to establish an injury in the performance of duty on May 22, 2019, as alleged; and (2) whether OWCP properly determined that appellant abandoned his request for an oral hearing.

## **FACTUAL HISTORY**

On May 25, 2019 appellant, then a 56-year-old customs and border patrol officer, filed a traumatic injury claim (Form CA-1) alleging that on May 22, 2019 he strained his back when he lifted a man, who weighed significantly more than himself, up and off a cement floor at a range during training while in the performance of duty. He stopped work on the date of injury and returned to work on May 25, 2019. No additional evidence was submitted.

In a development letter dated May 31, 2019, OWCP informed appellant that the evidence submitted was insufficient to establish his claim. It advised him of the type of evidence necessary to establish his claim and afforded him 30 days to submit the necessary evidence.

In a May 24, 2019 provider note, Dr. Jillian H. Call, Board-certified in emergency medicine, indicated that appellant presented with moderate low back pain which developed suddenly while lifting his 30-pound gun bag on that date. She provided an impression of strain of the lumbar region, initial encounter.

OWCP, by decision dated July 12, 2019, denied appellant's traumatic injury claim, finding that the factual evidence of record was insufficient to establish that the claimed incident occurred as alleged. It explained that the history of injury provided by appellant was inconsistent with the history of injury related by Dr. Call. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On July 25, 2019 appellant requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

Appellant submitted progress notes dated May 31 and July 19, 2019 from Dr. William C. Brink, a Board-certified internist. Dr. Brink noted that appellant presented for a follow-up examination regarding his May 24, 2019 work-related injury. He indicated that appellant was at a shooting range and he injured his back when he reached down to help a 450-pound man get up from his knees. Appellant's back pain then worsened 30 to 60 minutes later when he lifted his 30-pound gun belt. Dr. Brink diagnosed work-related lumbago and provided a 20-pound lifting restriction.

In a September 11, 2019 notice, OWCP's hearing representative informed appellant that his telephonic hearing was scheduled for October 21, 2019 at 9:00 a.m. Eastern Standard Time (EST). OWCP provided a toll-free number and passcode for access to the hearing. It mailed the notice to appellant's last known address of record.

By decision dated November 1, 2019, an OWCP hearing representative found that appellant had abandoned his request for an oral hearing as he had received written notification of the hearing 30 days in advance, but failed to appear. It further noted that there was no indication

in the record that appellant had contacted the Branch of Hearings and Review either prior to, or subsequent to, the scheduled hearing to explain his failure to appear.

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under FECA<sup>4</sup> 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 period of FECA,<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

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.<sup>8</sup> 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.<sup>9</sup> Second, the employee must submit sufficient evidence to establish that the employment incident caused a personal injury.<sup>10</sup>

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.<sup>11</sup> The employee has not met his or her burden of proof to establish the occurrence of an injury when there are inconsistencies in the evidence that cast serious doubt upon the validity of the claim.<sup>12</sup> 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

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<sup>4</sup> *Supra* note 2.

<sup>5</sup> *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).

<sup>6</sup> *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

<sup>7</sup> *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).

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

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

<sup>10</sup> *B.M.*, Docket No. 17-0796 (issued July 5, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

<sup>11</sup> *L.Y.*, Docket No. 21-0221 (issued June 30, 2021); *M.W.*, Docket No. 20-1489 (issued March 29, 2021); *M.F.*, Docket No. 18-1162 (issued April 9, 2019); *Charles B. Ward*, 38 ECAB 667, 67-71 (1987).

<sup>12</sup> *See L.Y., id.; M.W., id.; V.J.*, Docket No. 19-1600 (issued March 13, 2020); *E.C.*, Docket No. 19-0943 (issued September 23, 2019).

medical treatment may, if otherwise unexplained, cast sufficient doubt on an employee's statements in determining whether a *prima facie* case has been established.<sup>13</sup> 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.<sup>14</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant has not met his burden of proof to establish an injury in the performance of duty on May 22, 2019, as alleged.

In his Form CA-1 dated May 25, 2019, appellant claimed that on May 22, 2019 he sustained a back strain as a result of lifting a man, who weighed significantly more than himself, up and off a cement floor at a range during training while in the performance of duty. However, on May 24, 2019 he told Dr. Call, that he suddenly developed moderate low back pain at work while lifting his 30-pound gun bag on that date and on May 31 and July 19, 2019 he explained to Dr. Brink that he injured his back at work on May 24, 2019 when he reached down to help a 450-pound man get up from his knees, but that later that same day he experienced worsening back pain when he lifted his 30-pound gun belt.

The Board finds that appellant's description of the incident on his Form CA-1 is inconsistent with the account he related to Dr. Call and Dr. Brink. Appellant has not provided a singular account of the mechanism of injury.<sup>15</sup> As appellant has not provided a consistent description of the alleged employment incident and the mechanism by which he sustained an injury, the Board finds that he has not met his burden of proof.<sup>16</sup>

As appellant has not met his burden of proof to establish that the May 22, 2019 incident occurred in the performance of duty, as alleged, it is unnecessary to address the medical evidence of record regarding causal relationship.<sup>17</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

Under FECA and its implementing regulations, a claimant who has received a final adverse decision by OWCP is entitled to receive a hearing by writing to the address specified in the decision within 30 days of the date of the decision for which a hearing is sought.<sup>18</sup> Unless otherwise directed in writing by the claimant, OWCP's hearing representative will mail a notice of the time and place of the hearing to the claimant and any representative at least 30 days before

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<sup>13</sup> *Betty J. Smith*, 54 ECAB 174 (2002); *L.D.*, Docket No. 16-0199 (issued March 8, 2016).

<sup>14</sup> *See M.C.*, Docket No. 18-1278 (issued March 7, 2019); *D.B.*, 58 ECAB 464, 466-67 (2007).

<sup>15</sup> *Id.*

<sup>16</sup> *L.Y. and M.W.*, *supra* note 11; *H.D.*, Docket No. 15-1698 (issued May 4, 2016).

<sup>17</sup> *L.Y. and M.W.*, *supra* note 11; *J.C.*, Docket No. 19-0542 (issued August 14, 2019); *see M.P.*, Docket No. 15-0952 (issued July 23, 2015); *Alvin V. Gadd*, 57 ECAB 172 (2005).

<sup>18</sup> 20 C.F.R. § 10.616(a).

the scheduled date.<sup>19</sup> OWCP has the burden of proving that it properly mailed to a claimant and any representative of record.<sup>20</sup>

A claimant who fails to appear at a scheduled hearing may request in writing, within 10 days after the date set for the hearing, that another hearing be scheduled. Where good cause for failure to appear is shown, another hearing will be scheduled and conducted by teleconference.<sup>21</sup> The failure of the claimant to request another hearing within 10 days, or the failure of the claimant to appear at the second scheduled hearing without good cause shown, shall constitute abandonment of the request for a hearing.<sup>22</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that OWCP properly determined that appellant abandoned his request for an oral hearing.

Following OWCP's July 12, 2019 decision denying appellant's traumatic injury claim, he filed a timely request for an oral hearing before a representative of OWCP's Branch of Hearings and Review. In a September 11, 2019 notice, OWCP's Branch of Hearings and Review notified him that it had scheduled a telephonic hearing for October 21, 2019 at 9:00 a.m. EST. OWCP mailed the notice to appellant's last known address of record. The Board has held that absent evidence to the contrary, a letter properly addressed and mailed in the ordinary course of business is presumed to have been received. This is called the mailbox rule.<sup>23</sup> Appellant failed to call in for the scheduled hearing using the provided telephone number. He did not request a postponement or provide an explanation to OWCP for failure to appear for the hearing within 10 days of the scheduled hearing. As appellant failed to call in to the scheduled hearing or provide notification to OWCP's Branch of Hearings and Review within 10 days of the scheduled hearing explaining failure to appear, the Board finds that OWCP properly determined that he abandoned his request for an oral hearing.<sup>24</sup>

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<sup>19</sup> *Id.* at § 10.617(b).

<sup>20</sup> *L.L.*, Docket No. 21-1194 (issued March 18, 2022); *V.C.*, Docket No. 20-0798 (issued November 16, 2020); *L.T.*, Docket No. 20-1539 (issued August 2, 2021); *M.R.*, Docket No. 18-1643 (issued March 1, 2019); *T.P.*, Docket No. 15-0806 (issued September 11, 2015); *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

<sup>21</sup> 20 C.F.R. § 10.622(f).

<sup>22</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6(g) (September 2020); *see also L.L. and V.C. supra* note 20; *K.H.*, Docket No. 20-1198 (issued February 8, 2021); *A.J.*, Docket No. 18-0830 (issued January 10, 2019).

<sup>23</sup> *See L.L.; V.C.; and L.T., supra* note 20.

<sup>24</sup> *Id.*

**CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish an injury in the performance of duty on May 22, 2019, as alleged. The Board further finds that OWCP properly determined that appellant abandoned his request for an oral hearing.

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 12 and November 1, 2019 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 21, 2022  
Washington, DC

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

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board