

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

I.J., Appellant

and

**DEPARTMENT OF THE NAVY, NORFOLK
NAVAL SHIPYARD, Portsmouth, VA, Employer**

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**Docket No. 20-0599
Issued: November 22, 2022**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On January 27, 2020 appellant filed a timely appeal from a January 15, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.²

ISSUE

The issue is whether appellant has met his burden of proof to establish an occupational disease in the performance of duty, as alleged.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the January 15, 2020 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.*

FACTUAL HISTORY

On December 6, 2019 appellant, then a 50-year-old electrician, filed an occupational disease claim (Form CA-2) alleging that during the week of September 20, 2019 he developed a slipped disc and sciatic nerve pain due to factors of his federal employment, including lifting large volumes of materials, pulling cables, and setting up a submersible pump and a controller. He noted that he first became aware of his condition on September 20, 2019 and realized its relation to his federal employment on September 22, 2019. Appellant stopped work on October 7, 2019.

In an October 11, 2019 form report, Dr. Ronald Toht, a chiropractor, found appellant totally disabled from October 2 through 14, 2019.

In an October 22, 2019 medical report, Dr. Alan J. VanDerweele, a family medicine specialist, noted that appellant strained his low back while lifting a heavy object at work on October 3, 2019. He diagnosed strain of muscle, fascia, and tendon of the lower back.

In an October 29, 2019 after-visit summary, Dr. Jason M. McHugh, a Board-certified sports medicine specialist, noted that appellant was seen for a work-related injury and diagnosed lumbosacral radiculopathy.

A report of magnetic resonance imaging (MRI) scan of the lumbar spine dated November 8, 2019 noted appellant's complaint of an injury while lifting a heavy object three weeks prior and revealed multilevel chronic degenerative disc disease, facet arthropathy, and large disc protrusion at L5-S1 contributing to marked right foraminal narrowing.

In a November 22, 2019 employee incident report, appellant asserted that on September 20, 2019 he injured his back when he struggled with tangled cables while installing a submersible pump. He further noted that there was an increased amount of work activity during that week.

In a November 29, 2019 form report, appellant's supervisor, W.C., noted that appellant reported that he injured his back on September 20, 2019 while installing a submersible pump and had soreness in his right leg at the end of his shift, which worsened as the night progressed.

In a December 3, 2019 narrative statement, appellant explained that on September 19, 2019 he was assigned to install a submersible pump and controller on the decks of the USS Stennis. He related that he and his coworkers had to collect pallets and untangle the cables connected to the controller and the pump. Appellant asserted that the pump kept slipping out of his hands and a coworker had to help him untangle the cable and stretch it out. On September 20, 2019 he completed the pump installation and connected a blower, after which he experienced achiness in his leg. Appellant explained that he started to develop heavy pain the following day, which continued to worsen thereafter.

In a separate statement of even date, appellant described his work duties as an electrician, including installing and repairing motors, troubleshooting, and repairing electrical equipment such as air pressure compressors. He noted that his work duties regularly required him to carry materials on his shoulder or transport them on the ladder for two to three hours before taking a break. Appellant indicated that each cable weighed 30 to 50 pounds. He noted that during the week of his claimed injury he was palletizing and loading multiple cables, boxes, and blower fans and was

also setting up a submersible pump due to a recent water leak. Appellant reiterated that this was a difficult process because it required him to untangle the controller cables around the pump.

In a December 9, 2019 development letter, OWCP informed appellant of the deficiencies of his occupational disease claim and advised him of the type of factual and medical evidence necessary to establish his claim. In a separate development letter of even date, it requested that the employing establishment provide comments from a knowledgeable supervisor regarding the accuracy of his statements. OWCP afforded both parties 30 days to respond.

Appellant subsequently submitted a completed development questionnaire dated November 12, 2019, indicating that he began experiencing pain in his back on September 20, 2019 after twisting and lifting cables at work.

In a November 18, 2019 medical report, Dr. Reeta M. Arora, a Board-certified physical medicine and rehabilitation specialist, noted appellant's complaints of lower back and right leg pain since September 20, 2019, which he attributed to twisting and lifting cables at work. She observed that he ambulated with a cane and reported a history of a pinched nerve in 2009. Dr. Arora performed a physical examination, which revealed tenderness to palpation on the right at L4-5 and the sciatic notch and a positive straight leg raise test on the right. She reviewed the MRI scan results and diagnosed right lumbar radiculopathy and herniated nucleus pulposus on the right at L5-S1. Dr. Arora administered a right iliolumbar trigger point injection.

In a December 6, 2019 medical report, Dr. Mark B. Kerner, a Board-certified orthopedic surgeon, noted appellant's complaints of severe right-sided back and lower extremity pain, which appellant attributed to lifting and twisting his body while grabbing a falling pump at work in September 2019. He reviewed the lumbar MRI scan and diagnosed a very large disc herniation at L5-S1 causing probable L5 nerve root compression. Dr. Kerner recommended decompression and fusion of L5-S1 with possible facetectomy to stabilize the fusion.

In a December 16, 2019 response to OWCP's development questionnaire, appellant contended that he first noticed his low back pain after work on September 20, 2019 and related that his symptoms worsened over the weekend. He also noted that his body typically felt achy after performing his work duties, which consisted of lifting, pulling, and bending.

In a December 19, 2019 letter, the employing establishment confirmed that appellant reported injuring his back while routing cables and readjusting a pump orientation on September 20, 2019.

OWCP also received a position description for an electrician with the employing establishment, which outlined duties including lifting and carrying weights up to 45 pounds, pushing, pulling, reaching above shoulder height, walking, twisting, climbing, standing, crawling, kneeling, and bending.

In a December 20, 2019 narrative report, Dr. Kerner reiterated appellant's history of injury, noting that appellant had been experiencing severe pain in his lower back, which radiated down his right leg, after lifting and twisting his body to grab a pump at work on September 20, 2019. He also noted appellant's history of preexisting radiculopathy and outlined the treatment appellant received following the incident, including a summary of his physical examination findings and

diagnostic testing results. Dr. Kerner opined that appellant's past medical history was not significant because he had been asymptomatic in the years prior to September 20, 2019. He diagnosed a disc herniation at L5-S1 on the right, which he opined with medical certainty was caused by lifting and twisting a very heavy object at work on September 20, 2019.

In an undated statement, appellant noted that he sought a second opinion with Dr. Wilson P. Daughtery, a Board-certified neurosurgeon.

A scheduling notice dated January 8, 2020, indicated that appellant was scheduled to undergo right L5-S1 transforaminal lumbar interbody fusion surgery on January 28, 2020.

By decision dated January 15, 2020, OWCP found that the evidence of record failed to establish that appellant experienced an injury in the performance of duty as the evidence was insufficient to establish that the medical conditions arose during the course of employment and within the scope of compensable work factors, as alleged.

LEGAL PRECEDENT

An employee seeking benefits under FECA³ 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 establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.⁷

³ *Supra* note 1.

⁴ *J.W.*, Docket No. 18-0678 (issued March 3, 2020); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁵ *J.S.*, Docket No. 18-0657 (issued February 26, 2020); *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁶ *L.J.*, Docket No. 19-1343 (issued February 26, 2020); *R.R.*, Docket No. 18-0914 (issued February 24, 2020); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁷ *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *R.H.*, 59 ECAB 382 (2008).

An employee's statement 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.⁸ The employee's statement, however, must be consistent with the surrounding facts and circumstances and his or her subsequent course of action. An employee has not met his or her burden of proof to establish the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim. Circumstances such 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 doubt on an employee's statement in determining whether a *prima facie* case has been established.⁹

ANALYSIS

The Board finds that appellant has met his burden of proof to establish that the alleged employment factors occurred in the performance duty, as described.

Appellant filed an occupational disease claim alleging that he developed a back condition as a result of factors of his federal employment, including lifting large volumes of materials, pulling cables, and setting up a submersible pump and a controller. Thereafter, he submitted several statements describing his work duties including palletizing and loading cables, boxes, and blowers, installing and repairing motors and compressors, and carrying materials and cables weighing 30 to 50 pounds on his shoulder or a ladder for several hours. Appellant related that he often experienced achiness after performing his work duties. He further noted that on September 20, 2019 he lifted and twisted his body to readjust a pump and thereafter experienced leg discomfort which worsened in the ensuing days.

The employing establishment did not refute appellant's description of his job duties and there are no inconsistencies sufficient to cast serious doubt on the type of duties he alleged that he performed.¹⁰ In fact, an employing establishment's job description for electrician corroborated his statements and his supervisor, W.C., confirmed that appellant was tasked with the installation of a submersible pump on September 20, 2019 and that appellant reported injuring his back while readjusting the pump orientation and untangling cables.

Thus, the Board finds that the evidence of record establishes that appellant's employment duties as an electrician included lifting of heavy materials, pulling heavy cables, and setting up submersible pumps and controllers.

As appellant has established that the alleged employment factors occurred in the performance of duty as described, the question becomes whether the employment factors caused

⁸ *K.F.*, Docket No. 18-0485 (issued February 18, 2020); *M.S.*, Docket No. 18-0059 (issued June 12, 2019); *D.B.*, 58 ECAB 464, 466-67 (2007).

⁹ *Y.G.*, Docket No. 20-0688 (issued November 13, 2020).

¹⁰ *See generally T.A.*, Docket No. 19-1525 (issued March 4, 2020); *J.C.*, Docket No. 18-1803 (issued April 19, 2019); *L.S.*, Docket No. 13-1742 (issued August 7, 2014).

an injury.¹¹ Therefore, the case shall be remanded to OWCP to determine whether there is causal relationship between the accepted factors of appellant's federal employment and the diagnosed medical conditions.¹² Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision on the merits of this claim.

CONCLUSION

The Board finds that appellant has met his burden of proof to establish that the alleged employment factors occurred in the performance duty, as described. The Board further finds, however, that the case is not in posture for decision regarding causal relationship.

ORDER

IT IS HEREBY ORDERED THAT the January 15, 2020 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: November 22, 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

¹¹ *D.F.*, Docket No. 21-0825 (issued February 17, 2022); *M.A.*, Docket No. 19-0616 (issued April 10, 2020); *C.M.*, Docket No. 19-0009 (issued May 24, 2019).

¹² *T.M.*, Docket No. 20-0712 (issued November 10, 2020); *see also T.A.*, *supra* note 10.