

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

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<b>K.E., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 22-0110</b>
	)	<b>Issued: March 8, 2023</b>
<b>U.S. POSTAL SERVICE, ARCADIA POST OFFICE, Phoenix, AZ, Employer</b>	)	
_____	)	

*Appearances:*  
*Alan J. Shapiro, Esq., for the appellant<sup>1</sup>*  
*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  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On November 1, 2021 appellant, through counsel, filed a timely appeal from a September 1, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

Whether appellant has met his burden of proof to establish that an employment incident occurred on March 31, 2020 in the performance of duty, as alleged.

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<sup>1</sup> 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 an 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On April 6, 2020 appellant, then a 38-year-old city carrier assistant technician, filed a traumatic injury claim (Form CA-1) alleging that on March 31, 2020 he injured his upper right arm while in the performance of duty. On the reverse side of the claim form, appellant's supervisor acknowledged that appellant was injured in the performance of duty and that her knowledge of the facts comported with the statements made by appellant.

In a statement dated April 1, 2020, appellant noted that, as he was removing mail from his bag to put in a mailbox, he felt pain in his right upper arm.

In a report dated March 31, 2020, Dr. Jeffrey Zacher, a Board-certified family medicine specialist, related that appellant was seen that day for complaints of intermittent right shoulder, upper arm, and elbow pain, following a work-related injury that day. He related that appellant was a mail carrier and felt sudden pain while delivering mail that day. Dr. Zacher diagnosed strain of the muscles, fascia, and tendons of the right shoulder and upper arm. He also completed a duty status report (Form CA-17) of even date wherein he related that appellant could return to full-duty work.

Dr. Matthew Shores, Board-certified in family practice, evaluated appellant on April 10, 2020. He noted appellant's history of sudden right shoulder pain while delivering mail on March 31, 2020. Dr. Shores reviewed x-rays of appellant's right shoulder, which did not reveal fractures, avulsions, dislocations, soft tissue swelling, foreign bodies or calcifications. He limited appellant to left-handed duty only.

On April 27, 2020 appellant was seen by Jonathan Halley, a physician assistant. Mr. Halley again noted appellant's history of injury on March 31, 2020. He indicated that appellant had a probable right shoulder biceps and rotator cuff tear.

Appellant was seen on May 11, 2020 by Dr. Michael Domer, a Board-certified orthopedic surgeon. Dr. Domer related that appellant was seen for evaluation of right shoulder pain which had been ongoing since March 31, 2020, when he was pulling mail from his saddle to place in a mailbox, felt a pinch, and pulled his arm, appellant denied a prior right shoulder injury. In a follow-up report dated June 23, 2020, he related that appellant's right shoulder pain was worsening, following his March 31, 2020 injury.

In a development letter dated July 6, 2020, OWCP informed appellant that the evidence of record was insufficient to establish his claim. It advised him of the type of factual and medical evidence needed and provided a factual development questionnaire for his completion. OWCP afforded appellant 30 days to submit the requested evidence and return its completed questionnaire.

By decision dated August 17, 2020, OWCP denied appellant's traumatic injury claim, finding that the evidence of record was insufficient to establish that the claimed injury occurred on March 31, 2020, as alleged. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On February 3, 2021 appellant, through counsel, requested reconsideration and submitted additional evidence.

By decision dated February 10, 2021, OWCP denied appellant's request for reconsideration of the merits of his claim.

In a report dated May 28, 2021, Dr. Frank Moussa, a Board-certified orthopedic surgeon, noted that appellant indicated that he was injured at work on March 31, 2020. He stated that appellant's chondral and labral injury was potentially caused by the repetitive overuse nature of appellant's work as a postal carrier. Dr. Moussa explained that repetitive movements of the upper extremity such as those employed by postal carriers could be associated with early degeneration of the shoulder, which would manifest itself in chondral and labral pathology.

On July 2, 2021 appellant, through counsel, again requested reconsideration. Attached to the reconsideration request was a statement from appellant dated June 21, 2021. Appellant stated that on March 31, 2020 the pain returned as he was delivering mail at full duty. He also attached additional medical evidence.

By decision dated September 1, 2021, OWCP denied modification of its August 17, 2020 decision.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA 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 filed within the applicable time limitation, that an injury was sustained while in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.<sup>3</sup> These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.<sup>4</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. A fact of injury determination is based on two elements. 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>5</sup> Second, the employee must submit sufficient medical evidence to establish that the employment incident caused a personal injury.<sup>6</sup>

An injury does not have to be confirmed by eyewitnesses to establish 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>7</sup> It is

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<sup>3</sup> *A.F.*, Docket No. 18-1154 (issued January 17, 2019); *C.S.*, Docket No. 08-1585 (issued March 3, 2009); *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>4</sup> *A.F.*, *id.*; *S.P.*, 59 ECAB 184 (2007); *Victor J. Woodhams*, 41 ECAB 345 (1989); *Joe D. Cameron*, 41 ECAB 153 (1989).

<sup>5</sup> *Elaine Pendleton*, *supra* note 3.

<sup>6</sup> *John J. Carlone*, 41 ECAB 354 (1989).

<sup>7</sup> *Charles B. Ward*, 38 ECAB 667, 67-71 (1987).

well established that a claimant cannot establish fact of injury if there are inconsistencies in the evidence that cast serious doubt as to whether the specific event or incident occurred at the time, and place, and in the manner alleged.<sup>8</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 medical treatment may, if otherwise unexplained, cast serious doubt on an employee's statements in determining whether a *prima facie* case has been established.<sup>9</sup> However, 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.<sup>10</sup>

### ANALYSIS

The Board finds that appellant has met his burden of proof to establish that an employment incident occurred on March 31, 2020 in the performance of duty, as alleged.

Appellant has consistently described a specific incident occurring on March 31, 2020 while delivering mail in the performance of duty. An employee's statements alleging that an incident 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>11</sup>

On the reverse side of the Form CA-1, appellant's supervisor acknowledged that appellant was injured in the performance of duty and that her knowledge of the facts comported with the statements made by appellant.

The contemporaneous medical evidence of record also supports appellant's allegations regarding a work-related incident in the performance of duty on March 31, 2020. In his March 31, 2020 report, Dr. Zacher related that appellant experienced sudden pain on that day while delivering mail. Dr. Shores, in his April 10, 2020 report, noted that appellant experienced incidents of right shoulder pain on March 31, 2020. In his reports beginning on May 11, 2020, Dr. Domer related that on March 31, 2020 appellant was pulling mail from his saddle to place in a mailbox, felt a pinch, and pulled his arm. On May 28, 2021 Dr. Moussa noted that appellant indicated that he was injured at work on while delivering mail on March 31, 2020.

The Board therefore finds that appellant has met his burden of proof to establish that the March 31, 2020 employment incident occurred in the performance of duty, as alleged.

As appellant has established that the March 31, 2020 employment incident occurred as alleged, the question becomes whether the incident caused an injury.<sup>12</sup> As OWCP found that he had not established fact of injury, it did not evaluate the medical evidence. The case must,

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<sup>8</sup> *Gene A. McCracken*, 46 ECAB 593 (1995); *Mary Joan Coppolino*, 43 ECAB 988 (1992).

<sup>9</sup> *Robert A. Gregory*, 40 ECAB 478, 483 (1989).

<sup>10</sup> *D.B.*, 58 ECAB 464, 466-67 (2007).

<sup>11</sup> *Id.*

<sup>12</sup> *See M.A.*, Docket No. 19-0616 (issued April 10, 2020); *C.M.*, Docket No. 19-0009 (issued May 24, 2019).

therefore, be remanded for consideration of the medical evidence of record.<sup>13</sup> After any further development as deemed necessary, OWCP shall issue a *de novo* decision addressing whether appellant has met her burden of proof to establish an injury causally related to the accepted March 31, 2020 employment incident.

**CONCLUSION**

The Board finds that appellant has met his burden of proof to establish an incident in the performance of duty on March 31, 2020, as alleged. The Board further finds that the case is not in posture for decision with regard to whether appellant sustained an injury causally related to the accepted employment incident.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 1, 2021 decision of the Office of Workers' Compensation Programs is reversed and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: March 8, 2023  
Washington, DC

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

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

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

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<sup>13</sup> See *S.M.*, Docket No. 16-0875 (issued December 12, 2017).