

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

J.D., Appellant

and

**U.S. POSTAL SERVICE, ORINDA POST
OFFICE, West Sacramento, CA, Employer**

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**Docket No. 22-0479
Issued: March 1, 2023**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On February 7, 2022 appellant filed a timely appeal from a January 5, 2022 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 over the merits of this case.²

ISSUE

The issue is whether appellant has met her burden of proof to establish an injury in the performance of duty.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the January 5, 2022 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 October 27, 2021 appellant, then a 46-year-old postal distributor, filed an occupational disease claim (Form CA-2) alleging that she sustained neuropraxia of the right ulnar nerve causally related to her federal employment. She did not indicate what specific duties of her federal employment were alleged to have caused or aggravated this condition. Appellant indicated that she first became aware of her condition and its relationship to her federal employment on September 7, 2021.

OWCP received a work status report dated September 30, 2021 from Dr. Kanwal Kher, a pediatric nephrologist, which noted appellant's complaints of neck, right shoulder, and right wrist pain. Dr. Kher related that appellant could return to modified work that day.

Appellant submitted physical therapy records dated from October 1 through 26, 2021.

In a work status report dated October 11, 2021, Matthew Dong, a physician assistant, related diagnoses of neck pain and neuropraxia of the right ulnar nerve. He noted a history of injury that on September 7, 2021 appellant experienced right upper extremity pain from the right side of her neck, into the shoulder, elbow, wrist and fingers while lifting and moving parcels into bins.

On October 26, 2021 appellant was seen for a follow-up examination by Akram Esmaeili, a physician assistant. Mr. Esmaeili noted that appellant was a laborer and had been working modified duty. Appellant's diagnosis was listed as cervicalgia, and neuropraxia of the right ulnar nerve.

In a development letter dated November 5, 2021, OWCP informed appellant that the evidence submitted was insufficient to establish her claim. It advised her of the type of factual and medical evidence needed and requested that she complete a provided questionnaire in order to substantiate the factual elements of her claim. OWCP afforded appellant 30 days to respond and submit additional evidence. It did not receive a completed questionnaire from her during this time frame.

On reports dated December 7, 2021 Mr. Esmaeili repeated appellant's history of injury on September 7, 2021. He again noted diagnoses of neuropraxia of the right ulnar nerve, and neck pain.

By decision dated January 5, 2022, OWCP denied appellant's occupational disease claim, finding that the evidence of record was insufficient to establish the factual basis of her claim, as she did not provide any description or explanation of work-related activities alleged to have caused or aggravated her claimed condition. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

LEGAL PRECEDENT

An employee seeking benefits under FECA³ 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

³ *Supra* note 2.

United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation of FECA, 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.⁴ 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.

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 identified employment factors.⁵

An employee has the burden of establishing the occurrence of an injury at the time, place, and in the manner alleged, by a preponderance of the reliable, probative, and substantial evidence.⁶ 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.⁷ It is 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, place, and in the manner alleged.⁸ 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.⁹ 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.¹⁰

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish an injury in the performance of duty.

⁴ *C.K.*, Docket No. 19-1549 (issued June 30, 2020); *R.G.*, Docket No. 19-0233 (issued July 16, 2019); *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁵ *L.D.*, Docket No. 19-1301 (issued January 29, 2020); *S.C.*, Docket No. 18-1242 (issued March 13, 2019); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

⁶ *J.R.*, Docket No. 18-1079 (issued January 15, 2019); *William Sircovitch*, 38 ECAB 756, 761 (1987); *John G. Schaberg*, 30 ECAB 389, 393 (1979).

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

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

⁹ *S.D.*, Docket No. 21-0458 (issued September 14, 2021); *Robert A. Gregory*, 40 ECAB 478, 483 (1989).

¹⁰ *See M.C.*, Docket No. 18-1278 (issued March 7, 2019); *D.B.*, 58 ECAB 464, 466-67 (2007).

Appellant has not provided a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition.¹¹ Although by development letter dated November 5, 2021 OWCP advised appellant that the evidence of record was insufficient to establish that she was injured while performing any specific duty of her employment, appellant did not complete OWCP's questionnaire and explain her alleged factors of employment. No specific employment factors have been identified by appellant. As such, the Board finds that appellant has not established the factual basis for her occupational disease claim.

As the Board finds that appellant has not established the factual basis for her occupational disease claim, it is unnecessary to address the medical evidence of record regarding causal relationship.¹²

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish an injury in the performance of duty.

¹¹ *Supra* note 6.

¹² *See D.S.*, Docket No. 22-0257 (issued September 9, 2022); *M.P.*, Docket No. 15-0952 (issued July 23, 2015); *Alvin V. Gadd*, 57 ECAB 172 (2005).

ORDER

IT IS HEREBY ORDERED THAT the January 5, 2022 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 1, 2023
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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