

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

C.J., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
DAYTON VA MEDICAL CENTER,)
Dayton, OH, Employer)

**Docket No. 23-0997
Issued: January 17, 2024**

Appearances:

Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On July 21, 2023 appellant, through counsel, filed a timely appeal from a June 15, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ 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 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.

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met her burden of proof to establish an injury in the performance of duty on February 16, 2022, as alleged.

FACTUAL HISTORY

On March 2, 2022 appellant, then a 52-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that on February 16, 2022 she injured her right arm while in the performance of duty. She noted that a veteran pulled and twisted her arm when she helped him get dressed, and that she previously had surgery on her right arm on November 18, 2021. On the reverse side of the claim form, J.W., a nurse manager, controverted the claim, and indicated that appellant was not at work on February 16, 2022, and that she had previously claimed several injuries to the same body part.³ Appellant stopped work on February 17, 2022.

In a March 1, 2022 letter, Dr. Melinda Scott, an osteopathic orthopedic surgeon, released appellant to return to work with restrictions of no lifting over 10 pounds, and no pushing, pulling, or reaching overhead for three months.

In a March 10, 2022 letter, S.M., an employing establishment human resources specialist, controverted appellant's traumatic injury claim. She noted that she had provided inconsistent information regarding when the alleged injury occurred. S.M. related that appellant called off from work under the Family and Medical Leave Act (FMLA) on the alleged date of injury, February 16, 2022. She indicated that she then stated she was injured on February 15, 2022, another date that she was not at work due to FMLA leave.

In a March 15, 2022 development letter, OWCP informed appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence needed, including a detailed factual description of the alleged employment incident, and provided a questionnaire for her completion. OWCP afforded appellant 30 days to submit the necessary evidence.

OWCP thereafter received treatment records and diagnostic studies dated January 6, 2020 through February 10, 2022 documenting preexisting bilateral carpal tunnel syndrome, right shoulder tendinitis, and cervical radiculopathy. Appellant underwent left carpal tunnel syndrome (CTS) release surgery on June 26, 2020 by Dr. Thomas Cook, an osteopathic orthopedic surgeon, and right percutaneous tenotomy of the rotator cuff tendon on November 18, 2021 by Dr. Scott.

In a March 1, 2022 medical report, Dr. Scott noted that appellant related complaints of right shoulder pain after she returned to light-duty work following a previous right shoulder injury.

³ OWCP assigned the current claim OWCP File No. xxxxxx897. Appellant has a prior traumatic injury claim for an October 18, 2017 upper back injury, which OWCP denied under OWCP File No. xxxxxx884. She also filed traumatic injury claims for July 22 and October 18, 2021 shoulder injuries, which OWCP processed as short form closures under OWCP File Nos. xxxxxx419 and xxxxxx425, respectively. OWCP administratively combined the current claim with OWCP File Nos. xxxxxx419, xxxxxx425, and xxxxxx884, with the latter serving as the master file. Appellant also previously filed a traumatic injury claim for a November 1, 2019 left wrist condition, which OWCP denied under OWCP File No. xxxxxx411. OWCP has not administratively combined OWCP File No. xxxxxx411 with the other claims.

She performed a physical examination of the right shoulder, which revealed tenderness over the anterolateral border of the acromion. Dr. Scott diagnosed right rotator cuff tendinitis, and placed appellant on restrictions for three months.

In a March 3, 2022 note, Zachary Baum, a nurse practitioner, noted that appellant complained of left wrist pain following a left carpal tunnel release surgery on June 26, 2020. He documented physical examination findings and diagnosed recurrent CTS bilaterally.

By decision dated April 22, 2022, OWCP denied appellant's traumatic injury claim, finding that she had not submitted sufficient evidence to establish that the February 16, 2022 incident occurred, as alleged. Therefore, it concluded that the requirements had not been met to establish an injury as defined by FECA.

OWCP continued to receive evidence, including treatment notes for a September 13, 2022 right thumb injury.

On January 23, 2023 appellant, through counsel, requested reconsideration of OWCP's April 22, 2022 decision.

By letter dated May 2, 2023, the employing establishment continued to controvert the factual allegations of appellant's February 16, 2022 traumatic injury claim.

By decision dated June 15, 2023, OWCP denied modification of its April 22, 2022 decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ 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,⁵ 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.⁶ 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.⁷

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. The first component is whether the

⁴ *Supra* note 1.

⁵ *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).

⁶ *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).

⁷ *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).

employee actually experienced the employment incident at the time and place, and in the manner alleged. The second component is whether the employment incident caused an injury and can be established only by medical evidence.⁸

To establish that an injury occurred as alleged, the injury need not be confirmed by eyewitnesses, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.⁹ In determining whether a case has been established, such circumstances as late notification of injury, lack of confirmation of injury, and failure to obtain medical treatment may, if otherwise unexplained, cast substantial doubt on the employee's statements. The employee has not met his or her burden when there are such inconsistencies in the evidence as to cast serious doubt on the validity of the claim.¹⁰ 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.¹¹

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish an injury in the performance of duty on February 16, 2022, as alleged.

In her Form CA-1, appellant indicated that she sustained a right arm injury after a patient pulled and twisted her arm on February 16, 2022.

By letter dated March 10, 2022, the employing establishment controverted the claim, noting that appellant was off from work under FMLA leave on that date. OWCP, in its March 15, 2022 development letter, requested that she complete an attached questionnaire and provide a detailed factual description of the alleged employment incident. However, appellant did not respond to the development letter or otherwise provide a factual statement describing the incident alleged to have caused or contributed to a medical condition. Furthermore, the medical evidence of record did not identify any employment incident on or about February 16, 2022 alleged to have caused an injury to her arm.¹²

As the evidence of record is insufficient to establish that the alleged employment incident occurred as described, the Board finds that appellant has not met her burden of proof.

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.

⁸ *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).

⁹ *S.W.*, Docket No. 17-0261 (issued May 24, 2017).

¹⁰ *D.F.*, Docket No. 21-0825 (issued February 17, 2022); *Betty J. Smith*, 54 ECAB 174 (2002).

¹¹ *D.F.*, *id.*; *see also M.C.*, Docket No. 18-1278 (issued March 7, 2019); *D.B.*, 58 ECAB 464, 466-67 (2007).

¹² *Supra* note 8.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish an injury in the performance of duty on February 16, 2022, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the June 15, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 17, 2024
Washington, DC

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

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

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