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

| | | |
|---|---|---|
| **C.C., Appellant** | ) | |
| | ) | **Docket No. 16-0812** |
| **and** | ) | **Issued: August 26, 2016** |
| **DEPARTMENT OF DEFENSE, DEFENSE LOGISTICS AGENCY, Fort Belvoir, VA, Employer** | ) | |

*Appearances:*
*Paula Steadley*, for the appellant[1]
*Office of Solicitor*, for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

### ***JURISDICTION***

On March 13, 2016 appellant, through her representative, filed a timely appeal of a December 2, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA), 20 C.F.R. §§ 501.2(c), and 501.3, the Board has jurisdiction to consider the merits of the case.[3]

[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.*

[3] The Board notes that appellant submitted additional evidence after OWCP rendered its December 2, 2015 decision. The Board's jurisdiction is limited to reviewing the evidence that was before OWCP at the time of its final decision. Therefore the Board lacks jurisdiction to review this additional evidence on appeal. 20 C.F.R. § 501.2(c)(1). Appellant may submit this or any new evidence to OWCP, together with a formal request for reconsideration, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606(b)(2).

## ***ISSUE***

The issue is whether appellant met her burden of proof to establish a low back injury on July 1, 2015 in the performance of duty.

## ***FACTUAL HISTORY***

On August 20, 2015 appellant, then a 39-year-old distribution process worker, filed a traumatic injury claim (Form CA-1) alleging that she was "stowing in [building] 365 on overtime" on July 1, 2015 at 9:50 p.m. She indicated that she hurt her lower back and aggravated her sciatic nerve. On the reverse of the form, appellant's supervisor indicated that appellant's regular tour of duty was from 9:00 p.m. until 5:30 a.m.

Appellant submitted an emergency room note dated July 1 and 2, 2015 from Dr. Kenneth O. Ofoha, a physician Board-certified in emergency medicine. Dr. Ofoha indicated that appellant presented with back and lumbar pain which occurred when she was lifting heavy boxes at work resulting in reinjury of her back. He diagnosed lumbar strain and sciatica. Dr. Ofoha noted that appellant reported issues with bulging discs and prior back pain.

Appellant also submitted work release notes dated July 2, August 6, September 4, and 28, 2015 from Dr. Iyad Al-Husein, a Board-certified family practitioner, indicating that she could perform light duty only. Dr. Al-Husein diagnosed low back pain and lumbar radiculitis on July 2, 2015. He described the injury as "stowing at work; injured lower back."

The employing establishment provided appellant with a light-duty position on September 28, 2015. Appellant accepted this position on October 5, 2015.

In a letter dated October 23, 2015, OWCP requested that appellant provide additional factual and medical evidence in support of her claim. It particularly requested that appellant answer an attached questionnaire describing the details of how the claimed injury occurred. OWCP allowed appellant 30 days to respond.

Appellant submitted an additional work release note dated October 19, 2015 from Dr. Al Husein.

By decision dated December 2, 2015, OWCP denied appellant's traumatic injury claim as she failed to submit sufficient factual evidence to establish that the employment event occurred as alleged.

## ***LEGAL PRECEDENT***

OWCP defines a traumatic injury as, "[A] condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift. Such condition must be caused by external force, including stress or strain which is identifiable as to time and place of occurrence and member or function of the body affected."[4] In order to determine whether an employee actually sustained an injury in the performance of duty, OWCP begins with an analysis of whether fact of injury has been established. Generally, fact of injury

[4] 20 C.F.R. § 10.5(ee).

consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.[5] The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.

With respect to the first component of fact of injury, the 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. 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 subsequent course of action. An employee has not met his burden of proof of establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim. 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. 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.[6]

## ***ANALYSIS***

The Board finds that appellant has not submitted sufficient factual evidence to establish her traumatic injury claim.

As noted above, appellant must establish that her injury occurred at the time, place, and in the manner alleged. She attributed her diagnosed back strain and sciatica to "stowing" in the performance of duty. Appellant did not further describe this activity although OWCP, on October 23, 2015, asked her to provide details regarding how the claimed injury occurred. The Board is unable to determine from the evidence of record the manner of her alleged traumatic injury. Appellant has not described the mechanism of injury. She referenced "stowing," however she did not explain the mechanism of such an action with any specificity such as the number of items, their size, or weights etc. It is also unclear from the record how long she had performed "stowing." Appellant reported on her claim form that her injury occurred while she was performing overtime work at 9:50 p.m., but her supervisor indicated that appellant's regular work schedule was from 9:00 p.m. until 5:30 a.m. Given these facts the Board is unable to determine how this constituted overtime work or the exact period of time that appellant performed "stowing." Due to these deficiencies in the description of appellant's employment activities on July 1, 2015, the Board finds that she has not met her burden of proof to establish the initial component of the traumatic injury claim, fact of incident, and that she has not established her traumatic injury claim.

[5] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[6] *D.B.*, 58 ECAB 464, 466-67 (2007).

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 a low back injury in the performance of duty on July 1, 2015.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the December 2, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 26, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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