

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

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**J.K., Appellant**

**and**

**DEPARTMENT OF HOMELAND SECURITY,  
FEDERAL AIR MARSHAL SERVICE,  
Chantilly, VA, Employer**

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**Docket No. 17-0300  
Issued: August 9, 2017**

*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:  
CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On November 28, 2016 appellant, through counsel, filed a timely appeal from a September 27, 2016 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.

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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 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.*

## ISSUE

The issue is whether appellant met his burden of proof to establish an injury on August 23, 2015 in the performance of duty, as alleged.

## FACTUAL HISTORY

On September 9, 2015 appellant, then a 51-year-old federal air marshal, filed a traumatic injury claim (Form CA-1) alleging that on August 23, 2015 he experienced “severe tightness in [his] neck and right shoulder with pain into the elbow and wrist” prior to a flight. He advised that the pain continued through the mission and that on August 26, 2015 he was unable to pull the trigger on his weapon due to numbness and weakness in the right hand. The employing establishment controverted the claim, noting that, while trying to qualify for his firearm PPC (Practical Pistol Course), appellant reported finger weakness and numbness. Appellant informed the evaluator at the PPC that on August 22, 2015 he used a pistol and shotgun while skeet shooting. The employing establishment indicated that appellant provided notice of the alleged injury on September 9, 2015 and stopped work on August 26, 2015.

In an amendment to his claim dated September 30, 2015, appellant related that, while working on August 23, 2015, he sustained significant neck and right shoulder tightness radiating into the right elbow and wrist after placing his roll-aboard luggage in the overhead bin. The pain continued until he returned on August 25, 2015 from the mission. On August 26, 2015 appellant tried to complete his PPC, but was unable to pull the trigger of his duty weapon. He sought medical treatment on September 1, 2015.

On September 1, 2015 Dr. Gary A. Hanson, a Board-certified internist, related, “[Appellant] comes in complaining of weakness of the thumb and index finger of his right hand. He discovered this when he attempted to get recertified for his firearm which he failed.” Dr. Hanson diagnosed cervical radiculopathy. A September 3, 2015 magnetic resonance imaging (MRI) scan study showed a disc osteophyte at C3-4 causing severe right neural foraminal stenosis and possible nerve root contact, moderate right neural foraminal narrowing at C4-5, and moderate stenosis at C5-6 and C6-7 with moderate neural foraminal narrowing.

In a September 14, 2015 e-mail, J.L., a coworker, related that he took appellant for his PPC qualification on August 26, 2015, but he could not shoot his weapon. He advised, “I then asked him again, ‘What’s the problem?’ [Appellant] stated, ‘I was shooting pistols and shotguns a few days back and my shoulder and nerves are sore.’”

C.C., appellant’s supervisor, described the events of August 26, 2015 in a September 16, 2015 e-mail. He asserted that appellant told him that he could not qualify for his firearms training because of finger weakness and loss of sensation. C.C. took him to a colleague’s office to discuss the situation. He related, “During the conversation, [appellant] claimed that the previous Saturday, he was able to shoot a pistol and a shotgun, and successfully pull the triggers while he was skeet shooting. He also stated that his back had been very tight since then.” On August 30, 2015 appellant informed C.C. that he was filing a traumatic injury claim for back and neck pain before a flight on August 23, 2015.

On September 17, 2015 Dr. Hanson discussed the findings on the MRI scan study.<sup>3</sup> He related, “[Appellant] also states that he now remembers having lifted a heavy suitcase into an overhead bin on the airplane just prior to the onset of the weakness in his right hand.” Dr. Hanson diagnosed cervical disc disease with weakness into the right hand and a history of bilateral hip replacements with worsening pain.

In a September 29, 2015 attending physician’s report (Form CA-20), Dr. Hanson diagnosed cervical radiculopathy and checked a box marked “yes” that the condition was caused or aggravated by employment, noting that it occurred while appellant was on the job. The form provided a history of appellant experiencing pain in his neck after lifting luggage into an overhead compartment.

T.S., a coworker, related in an undated statement, received October 1, 2015, that appellant told him on August 26, 2015 that he could not pull the trigger of his weapon. He advised, “[Appellant] said he did not know why he could not pull the trigger, but that he was shooting shotguns over the weekend and his shoulder was sore from that activity. I hypothesized that shooting the shotgun misaligned something and [was] putting pressure on a nerve.”

By letter dated October 28, 2015, OWCP informed appellant that it had paid limited medical expenses as his injury seemed minor with minimal or no time lost from work.<sup>4</sup> It was now formally adjudicating the merits of his claim. OWCP requested that appellant provide further factual and medical information, including a detailed description of the circumstances surrounding the injury. It further asked that he clarify whether he was alleging a traumatic injury or an occupational disease.

Appellant, in a November 7, 2015 response, related that on August 23, 2015, after he placed his roll aboard luggage in an overhead bin, he felt severe tightness in his right shoulder and neck and pain in his right elbow and wrist. The pain continued through his mission, which ended August 25, 2015. Appellant tried to complete his PPC on August 26, 2015, but could not pull the trigger of his weapon. He described the medical treatment he received and advised that he did not have similar symptoms before the incident.

By decision dated December 7, 2015, OWCP denied appellant’s claim as the evidence of record was insufficient to establish that the work incident occurred as alleged. It noted that the record did not contain a history of him experiencing tightness in the neck and shoulder after putting roll-aboard luggage in an overhead bin until September 30, 2015.

In a report dated November 30, 2015, Dr. Hanson referred to his progress reports and related, “I am not entirely clear on the date of injury or onset of symptoms.” He advised that appellant had a herniated disc due to “lifting a heavy object on the job....”

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<sup>3</sup> In a September 28, 2015 report, Dr. Stephen R. Alatis, an osteopath, diagnosed degenerative bilateral hip arthritis after arthroplasties and found that appellant could no longer perform the duties of his job.

<sup>4</sup> Appellant submitted form reports dated October 8 and 22, 2015 and April 21, 2016 providing a history of him sustaining an injury when lifting luggage on August 23, 2015.

On December 15, 2015 appellant, through counsel, requested a telephone hearing before an OWCP hearing representative.<sup>5</sup> At the telephone hearing, held on August 2, 2016, he related that he had pain more in the shoulder than neck prior to the incident, but that it was mild and did not radiate into his arm or hand. Appellant advised that he was upset on August 26, 2015 when he could not complete his firearm course and the employing establishment took away his weapon. He did not remember stating that he had any neck pain before putting the luggage in the bin on August 23, 2015. By telling his supervisor and others that he had been able to pull a trigger five days earlier he was attempting to convey that something new had happened since that time. Appellant related that he provided a history of pain after putting up roll-aboard luggage on his handwritten claim form. He notified the employing establishment of his injury on August 30, 2015.

By decision dated September 27, 2016, OWCP's hearing representative affirmed the December 7, 2015 decision, finding that the record contained conflicting evidence sufficient to cast serious doubt on whether the August 23, 2015 incident occurred as alleged.

### **LEGAL PRECEDENT**

An employee seeking benefits under FECA<sup>6</sup> 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 and/or specific condition for which compensation is claimed are causally related to the employment injury.<sup>7</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>8</sup>

To determine whether an employee sustained a traumatic injury in the performance of duty, OWCP must determine whether "fact of injury" is established. First, an employee has the burden of demonstrating the occurrence of an injury at the time, place, and in the manner alleged, by a preponderance of the reliable, probative, and substantial evidence.<sup>9</sup> Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish causal relationship between the employment incident and the alleged disability and/or condition for which compensation is claimed.<sup>10</sup> An employee may establish that the employment

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<sup>5</sup> In an April 21, 2016 form report, Dr. John E. Capito, a Board-certified internist, diagnosed cervical spondylosis with myelopathy and checked a box marked "yes" that the condition arose from employment. He provided a history of appellant experiencing pain after lifting luggage in an overhead compartment.

<sup>6</sup> 5 U.S.C. § 8101 *et seq.*

<sup>7</sup> *Alvin V. Gadd*, 57 ECAB 172 (2005); *Anthony P. Silva*, 55 ECAB 179 (2003).

<sup>8</sup> *See Elizabeth H. Kramm (Leonard O. Kramm)*, 57 ECAB 117 (2005); *Ellen L. Noble*, 55 ECAB 530 (2004).

<sup>9</sup> *David Apgar*, 57 ECAB 137 (2005); *Delphyne L. Glover*, 51 ECAB 146 (1999).

<sup>10</sup> *Gary J. Watling*, 52 ECAB 278 (2001); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

incident occurred as alleged, but fail to show that his or her disability and/or condition relates to the employment incident.<sup>11</sup>

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 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.<sup>12</sup> An injury does not have to be confirmed by eyewitnesses in order 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 subsequent course of action.<sup>13</sup> 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.<sup>14</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 doubt on an employee's statements in determining whether he or she has established his or her claim.<sup>15</sup> However, an employee's statement regarding the occurrence of an employment incident is of great probative force and will stand unless refuted by strong or persuasive evidence.<sup>16</sup>

### ANALYSIS

Appellant maintained that he experienced severe neck and right shoulder tightness after he lifted rolling luggage into an overhead bin. He filed a traumatic injury claim on September 9, 2015 alleging that on August 23, 2015 he sustained neck and right shoulder tightness radiating into his elbows before a flight. Appellant's supervisor indicated in a September 16, 2015 e-mail that appellant told him on August 30, 2015 that he was filing a claim for back and neck pain he experienced before a flight on August 23, 2015. At the hearing, appellant indicated that he provided a history of injury on a written claim form dated September 9, 2015 of injuring his neck and right shoulder lifting luggage into an overhead bin. The earliest evidence of record that provides a history of pain on August 23, 2015 lifting luggage into the bin is the September 17, 2015 report from Dr. Hanson, a few weeks after the alleged incident.

The Board notes, however, that the record contains conflicting evidence regarding how appellant initially described the occurrence of his radiating neck pain. In a September 30, 2015 statement, appellant advised that he had neck and right shoulder tightness radiating into his right elbow and wrist on August 23, 2015 when he placed roll-aboard luggage into an overhead bin.

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

<sup>12</sup> See *Louise F. Garnett*, 47 ECAB 639 (1996).

<sup>13</sup> See *V.F.*, 58 ECAB 321 (2007); *Betty J. Smith*, 54 ECAB 174 (2002).

<sup>14</sup> *Id.*

<sup>15</sup> *Linda S. Christian*, 46 ECAB 598 (1995).

<sup>16</sup> *Gregory J. Reser*, 57 ECAB 277 (2005).

The pain continued throughout his work trip. On August 26, 2015, while trying to complete his PPC training, he was unable to pull the trigger with his right index finger.

The employing establishment controverted the claim. In an e-mail dated September 14, 2015, J.L. asserted that appellant told him on August 26, 2015 that he could not fire his weapon, that he had been shooting pistols and shotguns a few days earlier, and that his shoulder and nerves were sore. T.S., in an undated statement received October 1, 2015, related that appellant informed him on August 26, 2015 that he could not pull the trigger on his weapon. Appellant advised that he was not sure why he could not fire the weapon but “that he was shooting shotguns over the weekend and his shoulder was sore from that activity.” C.C., in a September 16, 2015 e-mail, indicated that appellant told him on August 26, 2015 that his back had been tight since shooting a pistol and shotgun the previous Saturday. The witness statements support that he attributed his stiffness to shooting the previous weekend rather than lifting luggage on August 23, 2015, and thus, show inconsistencies surrounding his account of the work incident.<sup>17</sup> At the hearing, appellant related that he was attempting to convey that something had changed since the weekend because he was able to shoot firearms at that time. He did not, however, describe the incident of lifting luggage to his supervisor or other witnesses on August 26, 2015.

Additionally, medical evidence submitted by appellant also failed to provide timely support for the factual component of his claim. Appellant sought medical treatment on September 1, 2015. Dr. Hanson obtained a history of appellant experiencing weakness of the right thumb and index finger when he tried to get his recertification for firearms. On September 17, 2015 he related that he remembered that the right hand weakness began after he lifted a suitcase into the overhead bin on an airplane. On November 30, 2015 Dr. Hanson reviewed his progress notes and opined that he was not clear when the injury or symptoms occurred.

The Board finds that the circumstances of this case, therefore, cast serious doubt upon the occurrence of the August 23, 2015 alleged employment incident. Given the inconsistencies in the evidence, the Board finds that appellant has not established the incident component of fact of injury due to inconsistencies in the evidence that case serious doubt as to whether the traumatic incident occurred at the time, place, and in the manner alleged on August 23, 2015.<sup>18</sup>

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 and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

The Board finds that appellant has not established that he sustained an injury on August 23, 2015 in the performance of duty, as alleged.

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<sup>17</sup> See *J.L.*, Docket No. 16-1114 (issued October 25, 2016).

<sup>18</sup> As appellant did not establish an incident as alleged, the Board need not discuss the probative value of the medical evidence. See *A.M.*, Docket No. 15-0526 (issued November 20, 2015).

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 27, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 9, 2017  
Washington, DC

Christopher J. Godfrey, 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