

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

J.G., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
EMERGENCY PREPAREDNESS &
RESPONSE, Washington, DC, Employer**

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**Docket No. 16-1834
Issued: March 14, 2017**

Appearances:
*Thomas S. Harkins, Esq., for the appellant*¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On September 15, 2016 appellant, through counsel, filed a timely appeal from a June 16, 2016 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 met his burden of proof to establish cervical and left shoulder injuries in the performance of duty on September 23, 2014.

FACTUAL HISTORY

On October 3, 2014 appellant, then a 52-year-old grants management specialist, filed a traumatic injury claim (Form CA-1) alleging that on September 23, 2014 he sustained an injury when he was lifting and removing a back pack containing a 17-inch laptop and iPad. He reported his injury as herniation of cervical vertebrae causing pain and numbness to his left shoulder. Appellant's supervisor reported that on October 3, 2014 at 9:38 a.m. appellant called and complained of pain in his shoulder and numbness in the wrist and hand. Appellant told the supervisor that he had transported his 17-inch laptop and other electronic devices to Naval Weapons Station on September 23, 2014.

In another Form CA-1 dated October 31, 2014, appellant reported that on September 23, 2014, he had just completed a 12-hour shift at the Regional Response Coordination Center (RRCC) and had loaded all electronic materials, including a 17-inch large/heavy computer, iPad, and work materials into his backpack. He walked to his car and, when removing his backpack, the weight transferred from both shoulders to one shoulder on the left, pulling his neck and shoulder out of alignment. Appellant felt a general muscle strain similar to what had previously occurred when he transported those devices. He described the nature of his injury as pain in the left neck, shoulder, and wrist, as well as occasional numbness to the left wrist and thumb. Appellant explained that he waited for his symptoms to resolve and used over-the-counter medications, which had previously alleviated his condition.

In an October 3, 2014 medical report, Dr. Jeffrey F. Shapiro, a Board-certified orthopedic surgeon, reported that appellant presented for pain and numbness in his left shoulder and wrist, which had been present for the last two weeks. He noted that appellant had not injured those areas. Dr. Shapiro diagnosed cervical radiculopathy from pressure on a nerve root. In an October 12, 2014 medical report, he recommended a magnetic resonance imaging (MRI) scan to assess for a disc herniation.

By letter dated December 16, 2014, OWCP advised appellant that, initially, his injury appeared to be a minor injury that resulted in minimal or no lost time from work. Because the employing establishment had not controverted continuation of pay or challenged the merits of the case, payment of a limited amount of medical expenses was administratively approved and the merits of the claim had not been formally considered. OWCP reported that the claim was reopened for consideration because the medical bills had exceeded \$1,500.00. It informed appellant that the evidence of record was insufficient to support his claim and advised him of the medical and factual evidence necessary. Appellant was afforded 30 days to submit the necessary evidence.

In a December 4, 2014 diagnostic report, Dr. Richard Silvergleid, a Board-certified radiologist, reported that an MRI scan of the cervical spine revealed mild reversal of the cervical lordosis, small central disc herniation C3-4 causing minimal midline cord deformity,

mild-to-moderate left posterolateral osteophyte formation C5-6, very mild cord deformity and moderate left C6 root compression, small central disc herniation and bony productive change C6-7, mild thecal sac deformity, and mild-to-moderate right C7 root impingement.

In a January 12, 2015 medical report, Dr. Shapiro reported that appellant presented for follow up regarding a work-related injury to his left shoulder and neck. An MRI scan of the cervical spine was performed on December 4, 2014 which revealed mild reversal of the normal lordosis, a central disc herniation at C3-4, left compression of the C6 nerve root, a disc herniation at C6-7, and mild-to-moderate osteophyte formation at C5-6. Dr. Shapiro diagnosed left cervical radiculitis, degenerative cervical disc, cervical disc herniation, and osteoarthritis of the vertebral column. He reported that appellant had cervical radiculopathy with cervical degenerative disc disease and osteophyte formation with radicular symptoms, which appeared to be an exacerbation of a chronic preexisting condition.

By decision dated January 23, 2015, OWCP denied appellant's claim finding that he failed to meet his burden of proof because the evidence of record did not establish that the incident occurred as alleged. It noted that he failed to respond to the December 16, 2014 development letter to establish the factual portion of his claim. OWCP also noted that appellant had failed to report the incident until October 3, 2014.

Medical reports dated January 28 through October 28, 2015 were submitted from Dr. Shapiro documenting treatment for appellant's injury.

On January 19, 2016 appellant, through counsel, requested reconsideration of OWCP's January 23, 2015 decision. Counsel submitted a brief citing legal precedent and noted that appellant's narrative statement would establish his traumatic injury claim.

In an undated narrative statement, appellant responded to the December 16, 2014 OWCP development questionnaire. He stated that he verbally reported his injury to his supervisor on October 1, 2014, less than 10 days after the date of the occurrence, and filed the requisite forms on October 3, 2014. Appellant reported that, after he submitted his Form CA-1, he was informed that DOL would no longer take a hard copy and had to resubmit an electronic application. He stated that his neck, left shoulder, wrist, and hand experienced pain and discomfort when the work backpack shifted while he was transferring the backpack from his shoulders to his vehicle. Appellant immediately removed the backpack, and did not place it on his shoulders for the duration of his work, yet the pain persisted. He reported no other injuries during the period between the event and the report. Appellant noted that he initially thought the injury was a strain yet the pain became unbearable despite home treatment. He stated that he had just completed his shift and walked out of the Emergency Coordination Center. Appellant explained that the injury occurred when he was removing the backpack, containing his laptop computer, iPad, and various loose leaf books and folders, from his shoulders to his automobile just outside the building. He stated that he did not sustain the injury as a result of a motor vehicle accident. Rather, appellant's injury occurred while moving employing establishment issued equipment to his vehicle at the end of his shift.

By letter dated April 13, 2016, counsel for appellant reported that he was supplementing the reconsideration request with a detailed narrative medical report from Dr. Shapiro dated April 11, 2016.

In the April 11, 2016 medical report, Dr. Shapiro reported that he first treated appellant on October 3, 2014 for complaints of pain and numbness in the left wrist and shoulder, which had started approximately two weeks prior. Appellant did not report a specific injury during the history, but on the intake form described a work-related injury which occurred on the job when he was carrying and moving a large and heavy laptop and iPad into and out of a backpack. He indicated that the injury occurred at the "RRCC" and was reported on October 3, 2014. Dr. Shapiro noted that the date of injury was reported as September 15 to 24, 2014, although the information later provided by counsel indicated the date of injury as September 23, 2014. At his October 17, 2014 follow up, he found that appellant continued to show signs of cervical radiculopathy at which time he recommended an MRI scan of the cervical spine to assess for a disc herniation. Following the MRI scan, appellant was treated again on January 12 and April 17, 2015.

Dr. Shapiro noted a history of lifting a computer in a bag and developing increasing pain in his neck. The MRI scan documented a small cervical disc herniation as well as sonic compression of the C6, C7 nerve roots on the left from a degenerative process. Dr. Shapiro opined that appellant's complaints were the result of an exacerbation of a preexisting condition, as these degenerative changes *i.e.*, osteophyte formation, in itself was not of traumatic etiology, but rather degenerative. He noted that this was reasonable given the preexisting degenerative condition, lifting something that is heavy could stretch the nerve tenting over the osteophyte and increase his symptoms. Dr. Shapiro concluded that appellant's condition would likely be permanent in nature and require surgical intervention.

By decision dated June 16, 2016, OWCP affirmed the January 23, 2015 decision finding that the evidence of record failed to establish that the incident occurred as alleged.

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 are causally related to the employment injury.³ 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.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 consists of two components which must be considered in

³ Gary J. Watling, 52 ECAB 278 (2001); Elaine Pendleton, 40 ECAB 1143, 1154 (1989).

⁴ Michael E. Smith, 50 ECAB 313 (1999).

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.

When an employee claims that he or she sustained an injury in the performance of duty he or she must submit sufficient evidence to establish that he or she experienced a specific event, incident, or exposure occurring at the time, place, and in the manner alleged. He or she must also establish that such event, incident, or exposure caused an injury.⁶ Once an employee establishes that he or she sustained an injury in the performance of duty, he or she has the burden of proof to establish that any subsequent medical condition or disability from work, for which he or she claims compensation is causally related to the accepted injury.⁷

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 subsequent course of action. 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 of proof when there are such inconsistencies in the evidence as to cast serious doubt on the validity of the claim.⁸

ANALYSIS

The Board finds that appellant has failed to meet his burden of proof to establish that he sustained a traumatic injury in the performance of duty on September 23, 2014.

The evidence of record contains inconsistencies regarding the alleged September 23, 2014 employment incident.⁹ Appellant first sought treatment for his injury on October 3, 2014 with Dr. Shapiro yet the initial medical report makes no mention of a work-related incident, stating that appellant complained of pain having been present for the past two weeks, but that he had not injured the area.

The medical evidence of record further casts serious doubt upon the validity of appellant's claim as his allegations are inconsistent with alleged facts and circumstances.¹⁰ In his April 11, 2016 medical report, Dr. Shapiro reported that appellant had not reported a specific

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

⁶ See generally *John J. Carlone*, 41 ECAB 354 (1989); see also 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. § 10.5(q) and (ee) (1999) (occupational disease or illness and traumatic injury defined). See *Victor J. Woodhams*, 41 ECAB 345 (1989) regarding a claimant's burden of proof in an occupational disease claim.

⁷ *Supra* note 5.

⁸ *Betty J. Smith*, 54 ECAB 174 (2002).

⁹ *T.R.*, Docket No. 12-0012 (issued May 16, 2012).

¹⁰ *M.W.*, Docket No. 12-1013 (issued October 24, 2012).

injury during his initial October 3, 2014 visit but, on the intake form, described a work-related injury which occurred on the job when he was carrying and moving a large and heavy laptop and iPad into and out of a backpack. He never related that exact history of injury appellant related on his claim form, *i.e.*, that he felt a pull on his neck as he transferred the backpack from both shoulders to one shoulder.

Dr. Shapiro noted that the date of injury was reported as September 15 to 24, 2014, although subsequent information provided by counsel indicated the date of injury as September 23, 2014. His report fails to provide support for an injury having occurred on September 23, 2014 as he is merely repeating the date provided by counsel. Moreover, it provides support for an injury having occurred over a period longer than a single workday or shift rather than a traumatic injury as alleged by appellant in this claim.¹¹ Furthermore, Dr. Shapiro noted that appellant in fact had a preexisting condition. He related that it was reasonable to assume that, given appellant's preexisting degenerative condition, lifting something that was heavy could stretch the nerve tenting over the osteophyte and increase his symptoms. Thus, the medical evidence of record fails to support the alleged facts and circumstances.¹²

Appellant has not provided the sufficient detail needed to establish that the incident occurred in the manner alleged.¹³ The Board finds that, based on appellant's two Form CA-1's and narrative statement, his supervisor's statement, and the remaining factual and medical evidence of record, that there are such inconsistencies as to cast serious doubt upon the validity of appellant's claim. As appellant has not reconciled these contradictions in the record, the Board finds that he has not met his burden of proof to establish that he experienced an employment-related incident on September 23, 2014 at the time, place, and in the manner alleged.¹⁴

Appellant may submit additional evidence, together with a written request for reconsideration, to OWCP within one year of the Board's 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 submitted sufficient evidence to establish that he sustained an injury in the performance of duty on September 23, 2014.

¹¹ A traumatic injury means a condition of the body caused by a specific event or incident, or series of events or incidents, within a single workday or shift. 20 C.F.R. § 10.5(ee). An occupational disease is defined as a condition produced by the work environment over a period longer than a single workday or shift. 20 C.F.R. § 10.5(q).

¹² *R.M.*, Docket No. 11-1921 (issued April 10, 2012).

¹³ *Supra* note 9.

¹⁴ As appellant has not established an employment incident, further consideration of the medical evidence is unnecessary. See *Bonnie A. Contreas*, 57 ECAB 364, 368 n.10 (2006).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated June 16, 2016 is affirmed.

Issued: March 14, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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