United States Department of Labor
Employees' Compensation Appeals Board

P.S., Appellant	)	
and	)	**Docket No. 19-1818**
	)	**Issued: April 14, 2020**
U.S. POSTAL SERVICE, AKRON POST OFFICE, Akron, OH, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 29, 2019 appellant, through counsel, filed a timely appeal from a July 5, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (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 his burden of proof to establish that an incident occurred in the performance of duty on February 15, 2018, as alleged.

FACTUAL HISTORY

On February 15, 2018 appellant, then a 45-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that he sustained injury at approximately 4:00 a.m. on that date when a "tractor trailer moved w emp. inside -- jumped off" while in the performance of duty. He alleged that he needed medical evaluation and possibly went into shock. On the reverse side of the claim form, appellant's supervisor checked a box marked "Yes" acknowledging that appellant had been injured in the performance of duty. Appellant stopped work on that same date.

In a development letter dated February 23, 2018, OWCP informed appellant of the deficiencies in his claim. It advised him of the type of factual and medical evidence necessary to establish his claim and provided a factual questionnaire for his completion. OWCP afforded appellant 30 days to respond.

In a February 15, 2018 state workers' compensation report, appellant related that the driver of a truck did not set the brake or chock the wheels, and the truck rolled forward toward his forklift, causing him to dive off. In the same report, an unidentifiable healthcare provider diagnosed lower back pain and lateral left knee strain.

Appellant presented to the emergency department on February 15, 2018 and was treated by Dr. Timothy Billups, Board-certified in emergency medicine. Dr. Billups reported that appellant was experiencing lower back and left lateral knee pain when the forklift appellant was riding at work fell onto its side, causing him to swing out of the forklift. An x-ray of the lumbar spine revealed lower lumbar spondylosis while an x-ray of the left knee revealed no acute osseous abnormality. Dr. Billups diagnosed acute low back pain and left knee strain.

By decision dated April 16, 2018, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish that the February 15, 2018 employment incident occurred as alleged. It noted that it was unclear as to how and where the claimed injury occurred because he provided inconsistent statements and had not responded to the February 23, 2018 development questionnaire. Therefore, the requirements had not been met to establish an injury as defined by FECA.

An August 2, 2018 memorandum of telephone call (Form CA-110) related that appellant's manager, J.C., who was on site when the alleged employment incident occurred, had contacted OWCP to verify that appellant sustained an injury on February 15, 2018 as alleged. She attested that she saw him remove his seatbelt and jump out of the forklift. J.C. noted that appellant subsequently fell to the concrete ground and the forklift landed on its side. She added that he was visually disoriented and dizzy and that the employing establishment sent him to the hospital to see whether he had any concussions or head injuries. J.C. indicated that her intent was to confirm that appellant sustained an actual injury on February 15, 2018 and that the incident was very traumatic for him.

In a letter dated August 10, 2018, the employing establishment disagreed with OWCP's April 16, 2018 decision, asserting that the February 15, 2018 employment incident did occur as alleged and that appellant sustained an injury as a result of the incident. J.C. again described the employment incident noting that a tow motor fell from the back of the trailer truck to the concrete ground of the parking lot on February 15, 2018. She explained that appellant appeared to be shaken up and unsure of everything that happened during the employment incident "because it was all within a very short time span." J.C. noted that he was instructed by the employing establishment to go to the emergency room following the February 15, 2018 employment incident to seek medical treatment "due to the serious nature of what had occurred."

On April 8, 2019 appellant, through counsel, requested reconsideration of the April 16, 2018 decision.

With the request for reconsideration, appellant submitted a September 6, 2018 medical report, wherein Dr. James Goff, Board-certified in sports medicine, noted appellant's complaint of lower back pain and history of a worked-related injury on February 15, 2018. Appellant explained that he was driving a forklift at the employing establishment where he worked and was loading a semi-truck when it started to move. He indicated that he grabbed the handle in the forklift and swung himself into the back of the semi-truck to avoid falling to the concrete ground and injured his back. Dr. Goff noted that appellant's pain severity was intermittent and elevated with sleeping incorrectly, bending, lifting, pushing, and pulling. He further noted that appellant claimed that he had no prior lower back surgery. Dr. Goff diagnosed lumbar region spondylosis.

By decision dated July 5, 2019, OWCP denied modification of its prior decision.

LEGAL PRECEDENT

An employee seeking benefits under FECA[3] 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,[4] 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.[5] 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.[6]

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

[3] *Id*.

[4] *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).

[5] *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).

[6] *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).

are two components involved in establishing fact of injury. First, the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time, place, and in the manner alleged. Second component is whether the employment incident caused a personal injury and can be established only by medical evidence.[7]

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 or her subsequent course of action.[8] The 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. 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 serious doubt on an employee's statements in determining whether a case has been established. 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.[9]

ANALYSIS

The Board finds that appellant has met his burden of proof to establish that the February 15, 2018 employment incident occurred in the performance of duty, as alleged.

Appellant has provided a consistent account of the time, place, and manner of injury that has not been refuted by strong or persuasive evidence contained in the record.[10] He has consistently described that he fell out of the forklift he was driving, either by jumping or swinging out of it, which injured him. Appellant also noted that he was in shock and needed medical evaluation. He immediately sought medical treatment in the emergency room on the same day after his alleged employment incident.

The Board notes that appellant's claim form was signed by his supervisor who acknowledged that the employment incident had occurred in the performance of duty as alleged. In an August 2, 2018 telephone memorandum (Form CA-110) and August 10, 2018 letter, appellant's manager, J.C., attested that she witnessed the February 15, 2018 employment incident when he was dislodged from the forklift he was driving as a semi-truck moved toward the forklift. She further explained that, after falling out of the forklift, appellant appeared visually disoriented, shaken up, and unsure of everything that happened during the employment incident "because it

[7] *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).

[8] *See J.M.*, Docket No. 19-1024 (issued October 18, 2019); *M.F.*, Docket No. 18-1162 (issued April 9, 2019).

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

[10] *See S.W.*, Docket No. 17-0261 (issued May 24, 2017) (the Board found that OWCP improperly determined that the alleged employment incident did not occur when appellant provided consistent accounts of the claimed incident and there was no evidence to refute her detailed description).

was all within a very short time span." The employing establishment required him to seek immediate medical attention following the incident.

As set forth above, a claimant's statement that an injury occurred at a given time, place, and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.[11] Having found no convincing evidence of inconsistency, the Board finds that appellant has established that the February 15, 2018 employment incident occurred in the performance of duty, as alleged.

As appellant has established that, the February 15, 2018 employment incident factually occurred, the question becomes whether this incident caused an injury.[12] The case must therefore be remanded for consideration of the medical evidence of record. Following this and other such further development as is deemed necessary, OWCP shall issue a *de novo* decision addressing whether appellant has met his burden of proof to establish an injury causally related to the accepted February 15, 2018 employment incident.[13]

CONCLUSION

The Board finds that appellant has met his burden of proof to establish that an incident occurred in the performance of duty on February 15, 2018, as alleged. The case is not in posture for decision, however, with regard to whether he has established an injury causally related to the accepted February 15, 2018 employment incident.

[11] *A.C.*, Docket No. 18-1567 (issued April 9, 2019); *Gregory J. Reser*, 57 ECAB 277 (2005).

[12] *See C.M.*, Docket No. 19-0009 (issued May 24, 2019).

[13] *Supra* note 11. *See also Betty J. Smith*, 54 ECAB 174 (2002).

ORDER

IT IS HEREBY ORDERED THAT the July 5, 2019 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 14, 2020
Washington, DC

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

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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