United States Department of Labor
Employees' Compensation Appeals Board

S.A., Appellant	)	
and	)	**Docket No. 19-1221**
	)	**Issued: June 9, 2020**
U.S. POSTAL SERVICE, POST OFFICE, Emporia, VA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 10, 2019 appellant filed a timely appeal from a November 13, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.[2]

ISSUE

The issue is whether appellant has met her burden of proof to establish a traumatic injury while in the performance of duty on July 10, 2017, as alleged.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that appellant submitted additional evidence on appeal. However, the Board's *Rules of Procedure* provides: The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal. 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

FACTUAL HISTORY

On August 1, 2017 appellant, then a 53-year-old retail sales associate, filed a traumatic injury claim (Form CA-1) alleging that on July 10, 2017 she experienced sinus headaches, a runny nose, coughing, and chest discomfort as a result of exposure to fumes and dust from contractors cutting galvanized steel in an unventilated area of the employing establishment while in the performance of duty. She stopped work on August 1, 2017.

Appellant provided a July 31, 2017 witness statement from coworker J.R., who stated that he observed her exposure to dusts and fumes from "cutting galvanized steel inside the [employing establishment] on July 10, 2017 to the present." J.R. further indicated that she advised him that dust in the office was making her sick. He contacted a poison control center agent, who posited that appellant's symptoms could have been caused by exposure to zinc oxide.

Appellant also submitted medical evidence in support of her claim.

In an August 1, 2017 report, Dr. Michael S. Anderson, a Board-certified family practitioner, related appellant's assertions that she had been exposed to welding fumes and dusts while at work on July 10, 2017. He noted a chest x-ray was within normal limits and pulse oximetry demonstrated oxygen saturation at 90 percent. Dr. Anderson diagnosed inhalation exposure to metal fumes and held appellant off work. In an August 4, 2017 follow-up report, he diagnosed inhalation injury/bronchospasm. Dr. Anderson prescribed medication.

In a duty status report (Form CA-17) dated August 13, 2017, Dr. Anderson diagnosed dyspnea due to inhalation exposure. He held appellant off from work due to "unsafe air quality" and prescribed an inhaler. In an August 14, 2017 report, Dr. Anderson again held her off from work.

By letter dated August 15, 2017, the employing establishment confirmed that contractors were "working onsite in the building." It controverted the claim as an August 8, 2017 air quality analysis of samples obtained at the employing establishment on August 1, 2017 showed no traces of zinc, lead, or dust above OSHA (U.S. Department of Labor, Occupational Safety and Health Administration) permissible exposure levels.[3]

In an August 15, 2017 letter, appellant noted that she was under medical care until August 28, 2017 due to a lung infection from inhaling smoke, dust, and fumes from the cutting of steel at the employing establishment.

By letter dated September 26, 2017, appellant contended that she had been exposed to toxic elements while at work from July 10 to August 1, 2017.[4]

[3] The sample analysis demonstrated zinc levels at less than 2.60 micrograms per cubic meter of air at the exterior loading dock, in the interior adjacent to double doors, and in the interior at the roof access ladder. The minimum risk level for zinc was noted as 2.50 micrograms per cubic meter of air.

[4] An August 11, 2017 toxicology screen demonstrated elevated levels of silver, thallium, and tin. An August 24, 2017 laboratory hair test analysis for toxic metals demonstrated elevated levels of magnesium, bismuth, and sodium.

In a statement dated March 19, 2018, appellant explained that, during 16-workdays from July 10 to August 1, 2017, she had been exposed to foul-smelling dust and fumes from a contractor drilling through brick and metal in an unventilated area. On August 1, 2017 she experienced dyspnea, coughing, a swelling sensation in her throat, and runny eyes and nose. Appellant asked the contractor to stop drilling as she and other workers had been sickened. A manager ordered the contractors to stop work and placed a fan in an effort to air out the area in the building.

In a report dated March 19, 2018, Dr. John W. Ellis, a Board-certified family practitioner, related appellant's account of metal dusts and fumes at work commencing on July 10, 2017 when a contractor had drilled through metal and brick to replace doors. He diagnosed upper and lower respiratory tract irritation, sensitization of lower respiratory tract, occupational asthma/reactive airway disease, and bronchitis. Dr. Ellis opined that these diagnoses were caused by significant exposure to metal dusts and fumes over a three-week period while at work.

In an April 25, 2018 letter, appellant requested that OWCP accept her claim for occupational asthma and bronchitis based on Dr. Ellis' opinion.

In a development letter dated October 11, 2018, OWCP notified appellant of the deficiencies of her claim and afforded her 30 days to submit additional medical evidence. It provided a questionnaire for her completion. By letter of even date, OWCP also requested that the employing establishment respond to appellant's allegations and provide information regarding her workplace exposure.

In response, appellant provided a completed questionnaire dated October 29, 2018. She attributed the claimed respiratory conditions to exposure to metal dusts and fumes for 120 hours from July 10 to August 1, 2017. Appellant alleged that management had refused to clean the employing establishment until the Postmaster General intervened.

Appellant also submitted an October 25, 2018 letter by Dr. Anderson, noting her treatment on August 1 and 4, 2017 for "inhalation exposure and injury."

By decision dated November 13, 2018, OWCP denied appellant's claim, finding that the factual component of fact of injury had not been established. It found that the evidence of record was insufficient to establish that the July 10, 2017 incident identified on appellant's August 1, 2017 claim form, or the subsequent workplace events mentioned in her later statements, had occurred as alleged. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

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 timely filed within the applicable time limitation period of FECA,[5] that an injury was sustained in the performance of duty as alleged,

[5] *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *J.P.*, 59 ECAB 178 (2007); *Joe D. Cameron*, 41 ECAB 153 (1989).

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 must first be determined whether fact of injury has been established. 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.[8] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.[9]

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.[10] 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.[11]

ANALYSIS

The Board finds that appellant has met her burden of proof to establish that the July 10, 2017 employment incident occurred while in the performance of duty as alleged.

Appellant filed a claim alleging that she sustained a respiratory condition and headaches caused by exposure to dusts and fumes during construction at the employing establishment commencing July 10, 2017.

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[6] *J.M.*, Docket No. 17-0284 (issued February 7, 2018); *R.C.*, 59 ECAB 427 (2008); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

[7] *See J.C.*, Docket No. 18-1803 (issued April 19, 2019); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[8] *M.M.*, Docket No. 17-1522 (issued April 25, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

[9] *M.H.*, Docket No. 18-1737 (issued March 13, 2019); *J.N.*, Docket No. 18-0675 (issued December 10, 2018); *E.H.*, Docket No. 16-1786 (issued January 30, 2017).

[10] *K.R.*, Docket No. 19-0477 (issued August 14, 2019); *B.P.*, Docket No. 19-0306 (issued August 9, 2019); *Charles B. Ward*, 38 ECAB 667, 67-71 (1987).

[11] *See M.C.*, Docket No. 18-1278 (issued March 7, 2019); *J.R.*, Docket No. 17-0056 (issued March 21, 2017); *D.B.*, 58 ECAB 464, 466-67 (2007).

OWCP denied appellant's claim as it found that there was insufficient evidence to establish the alleged July 10, 2017 employment exposure as factual. As noted, 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.[12]

In the present case, the record establishes that from July 10 to August 1, 2017, construction activities at the employing establishment, including drilling and cutting galvanized steel, generated dusts and fumes. The employing establishment's August 15, 2017 statement confirms that contractors were working inside the employing establishment during the period at issue. Appellant's coworker, J.R., provided a July 31, 2017 witness statement asserting that he personally observed appellant's exposure to dusts and fumes as a result of contractors cutting galvanized steel inside the employing establishment beginning July 10, 2017 through the date of his letter, and that she reported feeling ill due to these exposures. Additionally, appellant sought prompt medical care, first with Dr. Anderson on August 1, 2017, who related her account of exposure to metal dusts and welding fumes commencing July 10, 2017 and diagnosed respiratory conditions.

The respiratory injury appellant allegedly sustained is consistent with the facts and circumstances she set forth, witness statements, her course of action, and the medical evidence she submitted. The history of the occupational exposures was confirmed by Dr. Anderson's contemporaneous medical reports. The Board finds that this evidence establishes that the alleged exposures to construction dusts and fumes occurred as alleged.[13] Appellant has thus established the first component of fact of injury.[14]

As appellant has established the claimed occupational exposures occurred as alleged, the question becomes whether these exposures caused an injury.[15] As OWCP found that appellant had not establish fact of injury, it did not evaluate the medical evidence. Thus, the Board will set aside OWCP's November 13, 2018 decision and remand the case for consideration of the medical evidence of record.[16] After such further development as deemed necessary, OWCP shall issue a *de novo* decision addressing whether appellant has met her burden of proof to establish an injury causally related to the accepted occupational exposures.[17]

CONCLUSION

The Board finds that appellant has met her burden of proof to establish that the July 10, 2017 employment incident occurred in the performance of duty, as alleged. The Board further

[12] *See L.D.*, Docket No. 19-0039 (issued May 7, 2019); *J.R., id.*; *Gene A. McCracken*, Docket No. 93-2227 (issued March 9, 1995).

[13] *J.C., supra* note 7; *M.C., supra* note 11; *M.M., supra* note 8.

[14] *J.C., supra* note 7.

[15] *Id*.

[16] *S.M.*, Docket No. 16-0875 (issued December 12, 2017).

[17] *P.S.*, Docket No. 19-1818 (issued April 14, 2020).

finds that the case is not in posture for decision regarding whether she has established an injury causally related to the accepted occupational exposures.

ORDER

IT IS HEREBY ORDERED THAT the November 13, 2018 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: June 9, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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