United States Department of Labor
Employees' Compensation Appeals Board

L.T., Appellant	)	
and	)	**Docket No. 20-1499**
	)	**Issued: August 18, 2021**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS CRISIS LINE, Atlanta, GA, 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
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On August 5, 2020 appellant filed a timely appeal from a July 22, 2020 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 over the merits of this case.[2]

[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.*

ISSUE

The issue is whether appellant has met her burden of proof to establish chemical exposure while in the performance of duty on March 28, 2020, as alleged.

FACTUAL HISTORY

On March 31, 2020 appellant, then a 42-year-old health science specialist, filed a traumatic injury claim (Form CA-1) alleging that on March 28, 2020 at approximately 6:15 a.m. she had an asthma attack due to exposure to a substance sprayed from an aerosol can while in the performance of duty. She asserted that her coworker in the adjacent room sprayed the aerosol can twice, which elevated her heart rate and caused difficulty breathing with choking and coughing. Appellant noted that the fire department and paramedics were summonsed, and that her blood pressure elevated. On the reverse side of the claim form, E.E., a supervisor with the employing establishment, acknowledged that appellant was injured while in the performance of duty.

In an undated work excuse note, an unidentifiable healthcare provider excused appellant from work on March 30, 2020 for severe allergies and indicated that she could return to work on April 6, 2020. In a separate undated work excuse note, Dr. Jahmal Hairston, a Board-certified in otolaryngologist, excused appellant from work on April 3, 2020 and indicated that she could return to work on April 10, 2020

In an undated witness statement, L.S., appellant's supervisor, noted that on March 28, 2020 appellant reached out to supervisors at approximately 6:06 a.m., alleging that someone sprayed an unknown substance next door triggering her asthma attack. She indicated that she, along with other supervisors, immediately rushed to appellant's office, but initially found no visible signs of distress. L.S. alleged that they could not smell anything in the room or the hallway. She attested that when they checked on appellant's coworkers in the adjacent room, they explained that they had not sprayed anything but were using disinfecting wipes. L.S. related that appellant asserted that the smell was stronger than the wipes and that she heard something being sprayed. She observed that appellant took several long pauses as she reported having difficulty breathing. L.S. indicated that appellant initially refused to seek medical attention, but eventually requested medical assistance. She noted that emergency medical services (EMS) promptly arrived and that the situation was resolved by 8:00 a.m.

In an April 10, 2020 witness statement, W.H., appellant's coworker, noted that he was aware that aerosols had been used at the employing establishment.

In an April 13, 2020 e-mail, K.R., appellant's coworker, noted that on March 28, 2020 she had left her office briefly and her managers came into her office to ask if someone sprayed something.

On April 15, 2020 the employing establishment controverted appellant's claim, asserting that she had not submitted sufficient evidence to establish causal relationship.

In an undated work excuse note, an unidentifiable healthcare provider excused appellant from work on April 10, 2020 for severe allergies and indicated that she could return to work on April 17, 2020.

In an April 16, 2020 duty status report (Form CA-17), Dr. Hairston indicated that appellant's asthma was triggered at work on March 28, 2020. He provided work restrictions.

In an April 30, 2020 development letter, OWCP noted that, when appellant's claim was first received, it appeared to be a minor injury that resulted in minimal or no lost time from work and, therefore, payment of a limited amount of medical expenses was administratively approved without formally considering the merits of her claim. It reopened the claim for consideration and requested additional factual and medical evidence from appellant. OWCP provided her with a questionnaire for her completion and afforded her 30 days to respond.[3]

In a March 30, 2020 medical report, Dr. Hairston recounted that appellant reported that she had experienced an asthma attack at work on March 28, 2020 after her coworker sprayed an unknown substance in their workspace. He indicated that appellant's long-term asthma pattern may be classified as moderately persistent and gradually developed over the years. Dr. Hairston noted that appellant experienced symptoms including wheezing, chest tightness, and shortness of breath, pain, as well as difficulty breathing. He opined that appellant's asthma was triggered by an aerosol spray at work on March 28, 2020.

In an April 6, 2020 medical report, Dr. Hairston noted that appellant presented for follow up for treatment of asthma. He diagnosed allergic rhinitis, dyspnea, nasal hypertrophy, and asthma.

In an April 16, 2020 medical report, Dr. Hairston diagnosed allergic rhinitis, nasal hypertrophy, and nasal obstruction.

An April 20, 2020 computerized tomography (CT) scan of the paranasal sinuses revealed mucosal thickening of the maxillary and ethmoid sinuses, narrowing of the ostiomeatal units, nasal septal deviation, and mucosal hypertrophy of the turbinates narrowing the nasal air passageway.

In an April 21, 2020 medical report, Dr. Neil Persaud, a cosmetic, plastic, and reconstructive surgery specialist, noted that appellant presented for allergy evaluation. He indicated that appellant suffered an asthma episode on March 28, 2020.

In a May 4, 2020 medical report, Dr. Hairston diagnosed chronic sinusitis.

In a May 5, 2020 response to OWCP's development questionnaire, appellant indicated that she had been experiencing ongoing asthmatic symptoms prior to the alleged employment incident. She asserted that her asthma was triggered, however, when D.H., her coworker, reported to work one hour before her shift and sprayed equipment. Appellant related that she heard a woman's voice around 6:00 a.m. and then an aerosol can being sprayed twice at approximately 6:15 a.m. She attested that she began experiencing asthmatic symptoms, including shortness of breath, racing

[3] On May 29, 2020 OWCP afforded appellant additional 30 days to submit the requested evidence.

heart, and difficulty breathing. Appellant noted that her supervisors arrived in her room 10 minutes later to inspect the situation. She asserted that her supervisors never inspected her coworker's belongings to confiscate what was sprayed.

By decision dated July 22, 2020, OWCP denied appellant's claim, finding that she had not established the factual component of her claim. It concluded that the requirements had, therefore, not been met to establish an injury as defined by FECA.

LEGAL PRECEDENT

An employee seeking benefits under FECA[4] 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,[5] 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.[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 first must be determined whether fact of injury has been established. There 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. The second component is whether the employment incident caused a personal injury and can be established only by medical evidence.[8]

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.[9] The employee has not met his or her 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 serious doubt on an employee's statements

[4] *Supra* note 1.

[5] *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).

[6] *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).

[7] *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).

[8] *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).

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

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.[10]

ANALYSIS

The Board finds that appellant has met her burden of proof to establish chemical exposure while in the performance of duty on March 28, 2020.

Appellant has consistently reported that on March 28, 2020 her asthma attack was triggered by chemical exposure while in the performance of duty. She has also reported that she experienced multiple symptoms, including asthma, as a result. Appellant submitted a detailed account of the March 28, 2020 employment incident in her May 5, 2020 response to OWCP's development questionnaire, which is consistent with the account she provided on her claim form. As noted, an employee's statement alleging that an injury occurred at a given time and place, and in a given manner is of great probative value and will stand unless refuted by strong or persuasive evidence.[11] On the reverse side of the claim form E.E., a supervisor with the employing establishment, acknowledged that appellant was injured while in the performance of duty and that the facts about the injury comported with statements from appellant and/or witnesses. Supervisor L.S. also explained that coworkers in the office next to appellant were using a disinfectant at the time. The Board further notes that appellant sought medical treatment on the morning of the alleged exposure. The history of the March 28, 2020 employment incident was also confirmed by Drs. Hairston and Persaud's medical reports, which referenced the employment incident and noted their examinations contemporaneous to the said incident. For these reasons, the Board finds that this evidence of record is sufficient to establish that the alleged March 28, 2020 employment incident occurred as alleged.[12] Appellant has, thus, established the factual component of fact of injury.[13]

As appellant has established that the claimed occupational exposure occurred, as alleged, the question becomes whether this exposure caused an injury.[14] 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 July 22, 2020 decision and remand the case for consideration of the medical evidence of record.[15] After any such further development as deemed necessary, OWCP shall issue

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

[11] *Id.*

[12] *C.R.*, Docket No. 20-1147 (issued January 5, 2021).

[13] *Id.*

[14] *See J.C.*, Docket No. 18-1803 (issued April 19, 2019).

[15] *S.A.*, Docket No. 19-1221 (issued June 9, 2020).

a *de novo* decision addressing whether appellant has met her burden of proof to establish an injury causally related to the accepted occupational exposure.[16]

CONCLUSION

The Board finds that appellant has met her burden of proof to establish chemical exposure while in the performance of duty on March 28, 2020. The Board further finds that this case is not in posture for decision regarding whether appellant has established an injury causally related to the accepted chemical exposure.

ORDER

IT IS HEREBY ORDERED THAT the July 22, 2020 decision of the Office of Workers' Compensation Programs is reversed and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: August 18, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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