

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

_____)
K.H., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Portland, ME, Employer)
_____)

Docket No. 22-0370
Issued: July 21, 2022

Appearances:

Brice Simon, Esq., for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On January 14, 2022 appellant, through counsel, filed a timely appeal from a December 15, 2021 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.³

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.*

³ The Board notes that, following the December 15, 2021 decision, OWCP received additional evidence. 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 his burden of proof to establish a traumatic injury in the performance of duty on October 6, 2021, as alleged.

FACTUAL HISTORY

On October 19, 2021 appellant, then a 56-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on October 6, 2021 he developed a hernia when he lifted a package from the loading dock into a delivery vehicle while in the performance of duty. His supervisor indicated that he was unsure whether appellant's injury occurred in the performance of duty and noted that there was not enough information. Appellant stopped work on October 7, 2021.

In support of his claim, appellant submitted return to work notes dated October 9, 2021 from Emily LeVan, a nurse practitioner, and October 14, 2021 from Dr. Donald E. Dupuis, a Board-certified general surgeon. Ms. LeVan advised that appellant remain off from work until cleared by a general surgeon. Dr. Dupuis held appellant off work until November 8, 2021 pending a post-surgical evaluation.

In a letter dated October 25, 2021, the employing establishment controverted appellant's claim. It noted that he had reported a hernia injury in June 2021, that he had not filed a claim at that time, and that he had worked consistently since June 2021. The employing establishment attached an e-mail, which indicated that on October 7, 2021, the day after appellant's alleged employment incident, appellant called off work stating that he had a bad cough and was not feeling well. On October 9, 2021 appellant called in and reported that he was going to seek treatment at an emergency room as coughing had aggravated his hernia.

In a development letter dated October 26, 2021, OWCP advised appellant that additional factual and medical evidence was necessary to establish his claim. It requested that he submit a narrative medical report from his attending physician, which included the physician's opinion supported by a medical explanation as to how the reported employment incident caused or aggravated the claimed injury. OWCP also attached a questionnaire for appellant's completion. It afforded him 30 days to submit the necessary evidence.

In response, appellant submitted an emergency department report dated October 9, 2021 from Ms. LeVan. Ms. LeVan related that appellant was seen for abdominal pain, now resolved, which suddenly began four days prior due to an umbilical hernia which "developed after heavy lifting at work." She also noted that he had a previous incident, one month prior, but did not receive a medical evaluation at that time. Ms. LeVan indicated appellant's diagnoses as reducible umbilical hernia and left-sided lumbago and sciatica. She held him off work until cleared by a general surgeon.

In a medical report dated October 14, 2021, Dr. Dupuis related that appellant was seen in the emergency department and diagnosed with a reducible umbilical hernia. He stated that, over a month ago, appellant experienced profound pain and bulging at his bellybutton while at work but that it had become "acutely larger and uncomfortable" on October 9, 2021, thereby prompting his visit to the emergency department. In an operative report dated October 21, 2021, Dr. Dupuis related that he had performed laparoscopic ventral hernia repair on appellant.

By a letter dated October 28, 2021, the employing establishment controverted appellant's claim. It noted that he had reported a hernia in June 2021, but had not filed a claim at that time.

In notes dated November 8 and 22, 2021, Dr. Dupuis provided appellant with a work excuse indicating that he was recovering from hernia surgery.

OWCP, in a letter dated December 3, 2021, again requested that appellant provide the information requested in the October 26, 2021 development letter. It afforded him 10 days to respond. No response was received.

By decision dated December 15, 2021, OWCP denied appellant's claim as the evidence did not establish that the incident occurred on October 6, 2021, as alleged. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁴ 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 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, 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 a fact of injury has been established. There are two components involved in establishing fact of injury. The first component is that the employee must submit sufficient evidence to establish that he or she actually experienced the employment incident at the time and 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

⁴ *Id.*

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).

action.⁹ The employee has not met his or her burden of proof to establish the occurrence of an injury when there are inconsistencies in the evidence that 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 sufficient doubt on an employee's statements in determining whether a *prima facie* case has been established.¹⁰ An employee's statements 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 his burden of proof to establish that a traumatic incident occurred in the performance of duty on October 6, 2021, as alleged.

Appellant has maintained that he experienced pain on October 6, 2021 as result of lifting a package from the loading dock into a delivery vehicle while in the performance of duty. He indicated that he suffered a hernia. The medical evidence contemporaneous with the alleged employment incident establishes that appellant was treated in an emergency department on October 9, 2021, a few days later, for sciatica and a reducible umbilical hernia. The history of injury provided by Ms. LeVan that day was that appellant developed these conditions "after heavy lifting at work." Appellant returned to the emergency department on October 14, 2021, where Dr. Dupius reported that appellant remained uncomfortable due to the hernia.

Although the employing establishment controverted the claim indicating that appellant had complained of a hernia one month prior to October 6, 2021, it has not provided any strong or persuasive evidence to refute the occurrence of the October 6, 2021 lifting incident at the time and place and in the manner alleged by appellant. Since there are no inconsistencies in the evidence that cast serious doubt upon the validity of the claim, the Board finds that appellant has established a traumatic incident in the performance of duty on October 6, 2021, as alleged.

As appellant has established that the October 6, 2021 employment incident factually occurred as alleged, the question becomes whether the incident caused an injury.¹² Because OWCP found that he had not established fact of injury, it did not evaluate the medical evidence. The case must, therefore, be remanded for consideration of the medical evidence of record.¹³ After this and other such further development as 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 October 6, 2019 employment incident.

⁹ *M.F.*, Docket No. 18-1162 (issued April 9, 2019); *Charles B. Ward*, 38 ECAB 667, 67-71 (1987).

¹⁰ *Betty J. Smith*, 54 ECAB 174 (2002); *L.D.*, Docket No. 16-0199 (issued March 8, 2016).

¹¹ *See M.C.*, Docket No. 18-1278 (issued March 7, 2019); *D.B.*, 58 ECAB 464, 466-67 (2007).

¹² *See C.B.*, Docket No. 21-0670 (issued January 27, 2022); *L.O.*, Docket No. 20-0280 (issued October 1, 2021); *M.C.*, Docket No. 18-1278 (issued March 7, 2019); *D.B.*, 58 ECAB 464, 466-67 (2007).

¹³ *Id.*

CONCLUSION

The Board finds that appellant has met his burden of proof to establish that a traumatic incident occurred in the performance of duty on October 6, 2021, as alleged. 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 October 6, 2021 employment incident.

ORDER

IT IS HEREBY ORDERED THAT the December 15, 2021 decision of the Office of Workers' Compensation Programs is reversed in part and set aside in part; the case is remanded for further proceedings consistent with this decision of the Board.

Issued: July 21, 2022
Washington, DC

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

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board