United States Department of Labor
Employees' Compensation Appeals Board

D.M., Appellant	)	
and	)	**Docket No. 23-0180**
	)	**Issued: August 25, 2023**
U.S. POSTAL SERVICE, LOWNDESBORO POST OFFICE, Lowndesboro, AL, 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 November 18, 2022 appellant filed a timely appeal from an August 18, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP).[1] 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.[3]

[1] The Board notes that, during the pendency of this appeal, OWCP issued two December 1, 2022 merit decisions. One vacated the August 18, 2022 merit decision currently on appeal, and the other accepted appellant's claim for impingement syndrome of left shoulder and incomplete rotator cuff tear or rupture of left shoulder. OWCP's December 1, 2022 decisions are null and void as the Board and OWCP may not simultaneously exercise jurisdiction over the same issue(s) in a case on appeal. 20 C.F.R. §§ 501.2(c)(3), 10.626; *see e.g.*, *M.C.*, Docket No. 18-1278 (issued March 7, 2019); *Lawrence Sherman*, 55 ECAB 359, 360 n.4 (2004); *Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings*, 41 ECAB 880 (1990).

[2] 5 U.S.C. § 8101 *et seq*.

[3] The Board notes that, following the August 18, 2022 decision, appellant submitted additional evidence to OWCP. 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 July 5, 2022, as alleged.

FACTUAL HISTORY

On July 6, 2022 appellant, then a 57-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on July 5, 2022 the steering wheel of the postal vehicle he was driving recoiled and wrenched back" to the right with a great deal of pressure, twisting his upper arm, while in the performance of duty. On the reverse side of the claim form, the employing establishment challenged appellant's claim, noting that appellant completed his route on the date of injury and did not report the injury until the following day. Appellant stopped work on July 5, 2022, and returned to work on July 6, 2022.

In support of his claim, appellant submitted a July 9, 2022 report from Dr. Jesse Austin, a Board-certified emergency medicine physician, relating that appellant was seen for shoulder pain. Dr. Austin reviewed x-rays of the left shoulder and wrist, which revealed no abnormalities, and diagnosed sprain of left wrist and strain of muscle, fascia, and tendon at left shoulder and upper arm level. In a form report of even date, appellant related that he was driving an employing establishment vehicle on July 5, 2022, and, while turning left, a "veh[icle] fault/maintenance" caused the vehicle to turn right on its own. He explained that the sudden "jerk" strained his arm, wrist, and shoulder. Dr. Austin indicated that his findings were consistent with this account of the injury. He diagnosed left shoulder and left wrist injuries and released appellant for work with restrictions.

In a July 14, 2022 development letter, OWCP informed appellant of the deficiencies of his claim. It explained the type of factual and medical evidence required and provided a questionnaire for his completion. OWCP afforded appellant 30 days to respond.

OWCP subsequently received a July 13, 2022 report from Dr. Austin diagnosing sprain of left wrist and sprain of left shoulder.

In a July 14, 2022 work excuse note, Hayley Kennedy, a nurse practitioner, released appellant for work the following day.

On July 20, 2022 Dr. Austin noted a date of injury of July 5, 2022 and diagnosed left wrist and shoulder pain and rotator cuff tear.

In an August 3, 2022 work capacity evaluation (Form OWCP-5c), Dr. Matthew W. Parker, a Board-certified family practitioner, diagnosed left shoulder rotator cuff tear and released appellant for full-time work with restrictions, including no use of the left upper extremity.

In an August 8, 2022 e-mail, an employing establishment official, M.T., noted that she saw appellant at the casino on Saturday and stated, "[i]t is funny how he is in so much pain he couldn't work last week but he was there."

In an August 9, 2022 Form OWCP-5c, Dr. Parker diagnosed left rotator cuff tear and released appellant for work with restrictions.

By decision dated August 18, 2022, OWCP denied appellant's traumatic injury claim, finding that the evidence of record was insufficient to establish that the July 5, 2022 incident occurred, 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 FECA[4] 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, 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.[8] Fact of injury consists of two components that must be considered in conjunction with one another. First, 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.[9] Second, the employee must submit sufficient evidence to establish that the employment incident caused a personal injury.[10]

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.[11] 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 serious doubt on an employee's statements

[4] *Supra* note 2.

[5] *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *S.B.*, Docket No. 17-1779 (issued February 7, 2018); *Joe D. Cameron*, 41 ECAB 153 (1989).

[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] *R.R.*, Docket No. 19-0048 (issued April 25, 2019); *L.M.*, Docket No. 13-1402 (issued February 7, 2014); *Delores C. Ellyett*, 41 ECAB 992 (1990).

[8] *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *T.H.*, 59 ECAB 388, 393-94 (2008).

[9] *L.T.*, Docket No. 18-1603 (issued February 21, 2019); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[10] *B.M.*, Docket No. 17-0796 (issued July 5, 2018); *John J. Carlone*, 41 ECAB 354 (1989).

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

in determining whether a *prima facie* case has been established.[12] 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.[13]

ANALYSIS

The Board finds that appellant has met his burden of proof to establish a traumatic incident in the performance of duty on July 5, 2022, as alleged.

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.[14] Appellant alleged in his July 6, 2022 Form CA-1 that on July 5, 2022 the steering wheel of the postal vehicle he was driving recoiled and wrenched back to the right with a great deal of pressure, twisting his upper arm. He sought medical care on July 9, 2022 with Dr. Austin, who indicated that his findings were consistent with this account of the injury and diagnosed sprain of left wrist and sprain of muscle, fascia, and tendon at left shoulder and upper arm level. The injuries appellant claimed are consistent with the facts and circumstances he set forth, his subsequent course of action, and the medical evidence he submitted. The Board thus finds that he has met his burden of proof to establish the employment incident occurred in the performance of duty on July 5, 2022, as alleged.

As appellant has established that the July 5, 2022 employment incident factually occurred as alleged, the question becomes whether the incident caused an injury.[15] As OWCP found that he had not established fact of injury, it has not evaluated the medical evidence. The case must therefore be remanded for consideration of the medical evidence of record.[16] After this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision regarding causal relationship.

CONCLUSION

The Board finds that appellant has met his burden of proof to establish an employment incident in the performance of duty on July 5, 2022, as alleged. The Board further finds that the case is not in posture for decision regarding whether the medical evidence is sufficient to establish an injury causally related to the accepted July 5, 2022 employment incident.

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

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

[14] *See id*.

[15] *See M.H.*, Docket No, 20-0576 (issued August 6, 2020); *M.A.*, Docket No. 19-0616 (issued April 10, 2020); *C.M.*, Docket No. 19-0009 (issued May 24, 2019).

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

ORDER

IT IS HEREBY ORDERED THAT the August 18, 2022 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 25, 2023
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