

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

B.H., Appellant)	
)	
and)	Docket No. 24-0163
)	Issued: July 9, 2024
DEPARTMENT OF VETERANS AFFAIRS,)	
FRANKLIN DELANO ROOSEVELT)	
HOSPITAL, Montrose, NY, 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
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On December 12, 2023 appellant filed a timely appeal from an October 3, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal

¹ By order dated February 29, 2024, the Board remanded the case to OWCP to furnish a copy of the video footage it relied upon in its October 3, 2023 decision denying appellant's claim for fact of injury. *Order Remanding Case*, Docket No. 24-0163 (issued February 29, 2024). On March 4, 2024 the Director of the OWCP filed a petition to set a side order remanding case, requesting that the Board vacate its February 29, 2024 order remanding case. The Director provided the video footage to the Board that was furnished to OWCP by the employing establishment and requested the Board set aside the February 29, 2024 order and proceed to the adjudication of appellant's claim. On July 1, 2024 the Board issued an order vacating its February 29, 2024 order and reinstating the appeal. *Order Vacating Prior Board Order and Reinstating Appeal*, Docket No. 24-0163 (issued July 1, 2024).

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

ISSUE

The issue is whether appellant has met his burden of proof to establish a traumatic injury in the performance of duty on June 1, 2023, as alleged.

FACTUAL HISTORY

On June 12, 2023 appellant, then a 36-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that on June 1, 2023 he sustained an injury when he was grabbed, restrained, and forcefully pulled by a patient while in the performance of duty. He did not stop work.

In a June 15, 2023 development letter, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of factual and medical evidence required and provided a questionnaire for his completion. OWCP afforded appellant 60 days to respond.

In response, OWCP received a June 14, 2023 witness statement from, E.G., appellant's coworker, wherein she reported that on June 1, 2023 around 12:15 p.m., M.T., a patient, became agitated with appellant when he attempted to assist him. E.G. reported that M.T. grabbed appellant's arms and was pulling at him in a jerking motion as to bring him down. At that time, she intervened by asking M.T. to let go of appellant while she held both of M.T.'s arms to prevent him from further pulling on appellant's arms. E.G. reported that at that time, a code green was called and the incident was formally documented.

In a letter dated June 16, 2023, the employing establishment challenged the claim asserting that there were factual inconsistencies with regard to the time, place, and manner of injury as described by appellant. It reported that the June 1, 2023 incident was captured on surveillance video, and according to its review of the video footage, the incident did not appear to cause any immediate harm to appellant as he continued all normal activities following the alleged attack.

In a June 27, 2023 attending physician's report (Form CA-20), Dr. Nicole Belkin, a Board-certified orthopedic surgeon, reported that appellant sustained an injury to the left arm on June 1, 2023, and was being evaluated for a left arm injury of the brachial plexus. She checked a box marked "Yes" indicating that the diagnosed conditions were caused or aggravated by the employment activity.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the October 3, 2023 decision, a 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.*

In a letter dated June 28, 2023, the employing establishment challenged the claim asserting that appellant's medical reports indicated treatment for a left arm injury, whereas further review of the June 1, 2023 video footage indicated that the patient only came into contact with appellant's right arm.

In a witness statement received on July 5, 2023, J.M., appellant's co-worker, reported that she was the nurse in charge at the time of the incident. She reported that during lunch while passing meal trays, she heard M.T. yelling and when she turned he appeared to have pushed appellant's hand away. J.M. asked appellant if everything was okay and he said he was fine, and not to worry about it. She further stated that there was no report of injury from appellant during his shift.

In a witness statement received on July 6, 2023, G.D., the nurse manager, reported that on June 1, 2023 at approximately 12:15 p.m., the charge nurse came by her office asking if they should call a code green on M.T. because he threw food all over the staff, and also grabbed appellant by the arm. She informed the charging nurse to call a code green because M.T. should not have been touching the staff. G.D. reported that there were no further conversations regarding appellant and she did not receive a report of contact or complaint pertaining to his injury or what exactly happened in the dayroom. She noted that it was not until she received an email from the safety officer that she was informed appellant had been evaluated by the employing establishment for his injury.

Appellant submitted medical documentation and diagnostic studies dated June 9 through August 9, 2023 documenting treatment for a left arm injury and placing him off work. In a June 12, 2023 emergency department report, Dr. Jairo Ulloa, Board-certified in emergency medicine, reported that appellant presented to the emergency department for evaluation of a left shoulder injury. Appellant reported that on June 1, 2023 he was working at a psychiatric facility and helping to restrain a patient when he accidentally pulled his left shoulder. He reported that initially, his left shoulder was not hurting and subsequently began to experience pain about three days later. Appellant also complained of occasional tingling to the left wrist without weakness and denied any other injury. Dr. Ulloa diagnosed sprain of left shoulder and recommended further follow up with orthopedics.

On July 17, 2023 the employing establishment provided OWCP an edited copy of the video footage in MP4 format.

In follow-up letters dated July 17 and 20, 2023, OWCP advised appellant that it had conducted an interim review of his case and found that the evidence remained insufficient to establish his claim. It further advised him of the type of factual and medical evidence needed. OWCP noted that appellant had 60 days from the June 15, 2023 letter to submit the requested supporting evidence. It further advised that if the evidence was not received during this time, it would issue a decision based on the evidence contained in the record.

Appellant also submitted medical documentation and diagnostic studies dated August 11 through September 15, 2023 documenting treatment for cervical radiculopathy and left carpal tunnel syndrome with accompanying restrictions placing him off work. In an August 15, 2023 Form CA-20, Dr. Stanley Holstein, a Board-certified neurologist, noted the June 1, 2023 date of injury and diagnosed cervical radiculopathy and left carpal tunnel syndrome. He checked a box

marked “Yes” indicating that the diagnosed conditions were caused or aggravated by the employment activity.

By decision dated October 3, 2023, OWCP denied appellant’s traumatic injury claim, finding that he had not submitted evidence to establish that the events occurred as alleged. It found that his claimed injury was in conflict with evidence received regarding his left shoulder sprain. OWCP reported that the video footage demonstrated that patient did not make contact with the appellant’s left arm, but that contact was only with the right arm of appellant. Consequently, it found 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 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. 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. Second, the employee must submit sufficient evidence to establish that the employment incident caused a personal injury.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 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

⁴ *Supra* note 1.

⁵ *E.K.*, Docket No. 22-1130 (issued December 30, 2022); *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 *S.H.*, Docket No. 22-0391 (issued June 29, 2022); *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 *E.H.*, Docket No. 22-0401 (issued June 29, 2022); *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 *H.M.*, Docket No. 22-0343 (issued June 28, 2022); *T.J.*, Docket No. 19-0461 (issued August 11, 2020); *K.L.*, Docket No. 18-1029 (issued January 9, 2019); *John J. Carlone*, 41 ECAB 354 (1989).

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

medical treatment may, if otherwise unexplained, cast serious 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 not met his burden of proof to establish a traumatic injury in the performance of duty on June 1, 2023, as alleged.

In his Form CA-1, appellant alleged that on June 1, 2023 he was grabbed, restrained, and forcefully pulled by a patient while in the performance of duty. The employing establishment controverted the claim.

OWCP, in its June 15, July 17 and 20, 2023 development letters, informed appellant of the type of factual and medical evidence needed to establish his traumatic injury claim. It requested that he complete an attached questionnaire and provide a detailed factual description of the alleged employment incident. No response was received.¹²

The employing establishment submitted surveillance video documenting the June 1, 2023 incident around 12:15 p.m. The surveillance video revealed that at approximately 12:17 p.m., the patient grabbed and pulled appellant's right arm resulting in person-to-person contact.

The medical reports of record dated June 9 through August 9, 2023 document treatment for a left shoulder sprain which do not correlate with the June 1, 2023 surveillance video footage provided by the employing establishment which indicates person-to-person contact with appellant's right arm. In a June 12, 2023 emergency department report, Dr. Ulloa diagnosed left shoulder sprain and recounted appellant's history of injury who reported that, on June 1, 2023, he was working a psychiatric facility and helping to restrain a patient when he accidentally pulled his left shoulder. Subsequent medical reports dated August 11 through September 15, 2023 document treatment for cervical radiculopathy and left carpal tunnel syndrome.

The record also contains witness statements submitted by appellant's coworkers. However, these also fail to establish that appellant sustained a left arm injury in the performance of duty on June 1, 2023, as alleged.¹³

¹⁰ *K.H.*, Docket No. 22-0370 (issued July 21, 2022); *Betty J. Smith*, 54 ECAB 174 (2002); *see also L.D.*, Docket No. 16-0199 (issued March 8, 2016).

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

¹² *See J.D.*, Docket No. 22-0286 (issued June 15, 2022); *M.F.*, Docket No. 18-1162 (issued April 9, 2019).

¹³ *S.H.*, Docket No. 22-1090 (issued January 19, 2023).

The Board thus finds that due to the conflicting evidence regarding the time, place and manner in which the alleged incident occurred, that appellant has not established his claim.¹⁴

Appellant may submit new evidence or argument, together with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a traumatic incident in the performance of duty on June 1, 2023, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the October 3, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 9, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹⁴ See *W.O.*, Docket No. 12-1066 (issued November 19, 2012); *S.P.*, 59 ECAB 184 (2007); *Caroline Thomas*, 51 ECAB 451, 455 (2000).