

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

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W.S., Appellant)	
)	
and)	Docket No. 23-0585
)	Issued: June 17, 2024
U.S. POSTAL SERVICE, POST OFFICE,)	
Lexington, KY, Employer)	
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On March 17, 2023 appellant filed a timely appeal from a February 27, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.³

¹ The Board notes that, following the February 27, 2023 decision, OWCP received additional evidence. 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.*

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that during the pendency of this appeal, OWCP issued a December 13, 2023 merit decision denying the occupational disease claim. OWCP's December 13, 2023 decision is null and void as the Board and OWCP may not simultaneously exercise jurisdiction over the same underlying issue 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); *Douglas E. Billings*, 41 ECAB 880 (1990).

ISSUE

The issue is whether appellant has met his burden of proof to establish a left hip condition in the performance of duty, as alleged.

FACTUAL HISTORY

On April 15, 2021 appellant, then a 53-year-old city carrier, filed an occupational disease claim (Form CA-2) alleging that he developed a left hip condition that required a total hip replacement due to factors of his federal employment, including repetitive bending, twisting and entering and exiting his work vehicle. He noted that he first became aware of his condition and realized its relationship to his federal employment on January 10, 2018. Appellant stopped work on that date.

Appellant provided a narrative statement and asserted that he had experienced hip pain for seven years. In January 2021, he experienced severe pain due to bone-on-bone arthritis in his left hip and underwent injections which were not successful. On February 18, 2021 Dr. Tharun Karthikeyan, a Board-certified orthopedic surgeon, found appellant totally disabled from work pending hip replacement surgery. Appellant underwent surgery on March 1, 2021.

On March 31, 2021 C. Brad Roberson, a physician assistant, examined appellant and described his employment duties.

In a development letter dated April 20, 2021, OWCP informed appellant of the deficiencies of his claim. It advised him of the type of evidence necessary to establish his claim and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence.

OWCP received additional evidence. On February 18, 2021 appellant sought treatment from Dr. Karthikeyan due to left hip degenerative joint disease. Dr. Karthikeyan diagnosed left hip osteoarthritis. He performed a left total hip arthroplasty on February 1, 2021. In an April 27, 2021 report, Dr. Karthikeyan diagnosed osteoarthritis of the left hip resulting in the need for surgery. He opined that the contributing factors were job activities including twisting and entering and exiting his work vehicle while lifting heavy packages weighing 70 pounds or more.

On June 3, 2021 OWCP referred appellant, a statement of accepted facts (SOAF), and a series of questions to Dr. Stacie L. Grossfeld, an orthopedic surgeon, for a second opinion evaluation. In a July 14, 2021 report, Dr. Grossfeld reviewed the SOAF, which listed appellant's implicated employment duties as repetitive motion, and medical history. She performed a physical examination and opined that the underlying osteoarthritis was not secondary to work factors. Dr. Grossfeld attributed this condition to genetics and the natural aging process. She concluded that the fact that appellant needed a total hip replacement was not related to his job duties. Dr. Grossfeld provided a work capacity evaluation (Form OWCP-5c) and found that he could work with no limitations or restrictions.

By decision dated August 4, 2021, OWCP denied appellant's occupational disease claim, finding that the evidence of record was insufficient to establish causal relationship between his diagnosed condition and his accepted factors of his employment.

On August 17, 2021 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. Following a preliminary review, by decision dated October 13, 2021, OWCP's hearing representative vacated the August 4, 2021 decision, finding a conflict of medical opinion evidence between Drs. Grossfeld and Karthikeyan. The case was remanded for referral to an impartial medical examiner (IME) for an examination and opinion on causal relationship.

On November 12, 2021 OWCP referred appellant, along with a SOAF and a series of questions to Dr. Michael M. Best, an orthopedic surgeon, for an impartial medical examination.⁴ He agreed with Dr. Grossfeld's opinion that appellant's condition was not a work-related cumulative trauma injury requiring total hip arthroplasty. Dr. Best explained that appellant's preexisting sickle cell disease resulted in osteoarthritis of the left hip, which required a hip joint replacement, and that there was no objective evidence that cumulative trauma resulted in the osteonecrosis/ degenerative osteoarthritis of his left hip.

By *de novo* decision dated January 10, 2022, OWCP denied appellant's occupational disease claim, finding that he had not submitted sufficient evidence to establish that the claimed events occurred as alleged. Consequently, it found that appellant had not met the requirements to establish an injury as defined by FECA.

On February 4, 2022 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on May 17, 2022. During the hearing, appellant testified that he had injured his left hip at work and continued to work through the pain until he could barely walk.

In a February 14, 2022 report, Dr. Robert W. Collins, III, an internist, explained that appellant had a medical history significant for sickle cell trait, which was a completely different medical condition from sickle cell disease as it lacked both the serious medical complications and symptoms associated with sickle cell disease.

By decision dated July 25, 2022, OWCP's hearing representative vacated the January 10, 2022 decision, finding that the claim was denied due to insufficient medical opinion evidence establishing causal relationship between appellant's diagnosed condition and his employment activities. She remanded the case for a supplemental report from Dr. Best reviewing Dr. Collin's report and discussing the etiology and course of osteoarthritis with medical reasoning on whether appellant's employment activities caused, aggravated, or participated the diagnosed condition.

On October 27, 2022 OWCP requested a supplemental report from Dr. Best. No response was received.

On January 4, 2023 OWCP referred appellant, along with a SOAF, and a series of questions, to Dr. Douglas Gula, an osteopath and Board-certified orthopedic surgeon serving as a new IME, to resolve the conflict of medical opinion between Drs. Karthikeyan and Grossfeld.

In a January 31, 2023 report, Dr. Gula noted his review of the SOAF and medical record, and provided his findings on physical examination. He related that appellant attributed his left hip

⁴ The SOAF noted repetitive motion as appellant's implicated employment factor.

condition to repetitive standing and heavy lifting, but explained that there was a paucity of medical literature identifying these specific work-related activities to hip osteoarthritis and that there was little to no association between standing and repetitive heavy lifting and development of osteoarthritis of the hip. Dr. Gula therefore opined that appellant's diagnosed left hip osteoarthritis was not work related.

By decision dated February 27, 2023, OWCP denied appellant's occupational disease claim, finding that the factual component of fact of injury had not been established as the evidence did not support that the injury and/or event occurred. Thus, it concluded that the requirements to establish an injury, as defined by FECA, had not been met.

LEGAL PRECEDENT

An employee seeking benefits under FECA⁵ 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,⁶ 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.⁷ 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.⁸

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit: (1) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; (2) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; and (3) medical evidence establishing that the diagnosed condition is causally related to the identified employment factors.⁹

An employee's statement 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 The employee's statement, however, must be consistent with the surrounding facts and circumstances and his or her subsequent course of action. An 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. Circumstances such as late notification of injury, lack

⁵ *Supra* note 2.

⁶ *L.D.*, Docket No. 22-0214 (issued September 21, 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).

⁷ *L.D.*, *id.*; *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).

⁸ *L.D.*, *id.*; *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).

⁹ *T.W.*, Docket No. 20-0767 (issued January 13, 2021); *L.D.*, Docket No. 19-1301 (issued January 29, 2020); *S.C.*, Docket No. 18-1242 (issued March 13, 2019).

¹⁰ *F.S.*, Docket No. 21-1040 (issued March 10, 2023); *K.F.*, Docket No. 18-0485 (issued February 18, 2020); *M.S.*, Docket No. 18-0059 (issued June 12, 2019); *D.B.*, 58 ECAB 464, 466-67 (2007).

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 doubt on an employee's statement in determining whether a *prima facie* case has been established.¹¹

ANALYSIS

The Board finds that appellant has met his burden of proof to establish that the employment factors occurred in the performance of duty, as alleged.

Appellant filed a Form CA-2 alleging that he developed a left hip condition due to factors of his federal employment including repetitive activities, such as walking, twisting, bending, and entering and exiting his work vehicle, in the performance of his duties as a city carrier. Thereafter, he submitted medical evidence indicating that lifting heavy packages weighing 70 pounds while twisting and entering and exiting his work vehicle contributed to his left hip condition.

The employing establishment did not refute appellant's description of his job duties.¹² As there are no inconsistencies sufficient that cast serious doubt on the type of duties he alleged that he performed,¹³ the Board finds that appellant has established the implicated factors of his federal employment.

As appellant has established that the employment factors occurred in the performance of duty as alleged, the question becomes whether the employment factors caused an injury.¹⁴ Therefore, the case shall be remanded to OWCP to determine whether appellant sustained an injury causally related to the accepted factors of his federal employment as previously ordered by the hearing representative.¹⁵ Following this, and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that appellant has met his burden of proof to establish that the employment factors occurred in the performance of duty, as alleged. The Board further finds, however, that the case is not in posture for decision as to whether he sustained an injury causally related to the accepted factors of his federal employment.

¹¹ *F.S., id.: Y.G.*, Docket No. 20-0688 (issued November 13, 2020).

¹² *E.P.*, Docket No. 21-0899 (issued January 25, 2023).

¹³ *See generally T.A.*, Docket No. 19-1525 (issued March 4, 2020); *J.C.*, Docket No. 18-1803 (issued April 19, 2019); *L.S.*, Docket No. 13-1742 (issued August 7, 2014).

¹⁴ *D.F.*, Docket No. 21-0825 (issued February 17, 2022); *M.A.*, Docket No. 19-0616 (issued April 10, 2020); *C.M.*, Docket No. 19-0009 (issued May 24, 2019).

¹⁵ *I.J.*, Docket No. 20-0599 (issued November 22, 2022); *T.M.*, Docket No. 20-0712 (issued November 10, 2020); *see also T.A.*, *supra* note 13.

ORDER

IT IS HEREBY ORDERED THAT the February 27, 2023 decision of the Office of Workers' Compensation Programs is reversed. The case is remanded for further development consistent with this decision of the Board.

Issued: June 17, 2024
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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