

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

T.R., Appellant)	
)	
and)	Docket No. 24-0687
)	Issued: September 12, 2024
DEPARTMENT OF VETERANS AFFAIRS,)	
OMAHA VA MEDICAL CENTER, Omaha, NE,)	
Employer)	
)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 14, 2024 appellant, through counsel, filed a timely appeal from a June 3, 2024 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 appellant submitted additional evidence following the June 3, 2024 decision and 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 his burden of proof to establish an injury in the performance of duty on June 26, 2023, as alleged.

FACTUAL HISTORY

On June 30, 2023 appellant, then a 73-year-old environmental health technician, filed a traumatic injury claim (Form CA-1) alleging that on June 26, 2023 he injured his left shoulder when he picked up a trash liner and placed it in a dumpster, while in the performance of duty. He noted that at the time of the incident, he felt a twinge and pain in his shoulder, but the next day he awoke with increased pain, he could not move his left arm past his ear, and he sought treatment at an emergency room. Appellant stopped work on June 27, 2023. The employing establishment acknowledged that the employee was injured in the performance of duty.

In a June 27, 2023 treatment note, Dr. Jennifer L. Grigsby, an internist, noted that appellant was seen for left shoulder pain and that he had received a steroid injection in the left shoulder. She released appellant to return to work full duty effective July 3, 2023.

In a July 2, 2023 treatment note, Dr. Scott F. Menolascino, a Board-certified internist, noted that appellant was treated for left shoulder pain. He suspected mild irritation to the rotator cuff, recommended conservative treatment, and noted that appellant could return to work on July 9, 2023.

July 6, 2023 progress notes reflect that Dr. Cherie Ferguson, an osteopath Board-certified in family practice, treated appellant for left shoulder pain, provided an injection, and referred him for an orthopedic consult. A July 6, 2023 work excuse, indicated that appellant was unable to return to work until July 15, 2023.

In a letter dated July 7, 2023, a human resources specialist with the employing establishment, challenged the claim due to a lack of a medical diagnosis.

In a development letter dated July 13, 2023, OWCP advised appellant that additional factual and medical evidence was necessary to establish his claim. It noted that the evidence was insufficient to establish that he actually experienced the employment incident or employment factors alleged to have caused the incident. Appellant was also advised regarding the type of medical evidence required to establish his claim. OWCP provided a questionnaire for his completion. Appellant was afforded 60 days to submit the requested evidence.

In a July 13, 2023 attending physician's report (Form CA-20), Dr. Mary Tadros, an internist, noted appellant's date of injury as June 26, 2023. She diagnosed left shoulder arthritis due to repetitive motion. In a return to work note of even date, Dr. Tadros opined that appellant was unable to work until July 24, 2023, and could resume full duty on July 24, 2023.

In a July 18, 2023 response to the questionnaire, appellant noted that there were no witnesses to the incident. He explained that the immediate effects of his injury were that he could not move his upper arm. The next morning, appellant sought treatment at the employing establishment emergency room. He denied any other injuries.

OWCP continued to receive return to work notes. In a July 27, 2023 return to work note, Dr. Tadros advised that appellant would not be able to return to work until August 14, 2023, due to his left shoulder arthritis. She explained that the repetitive motion required during his duties caused severe pain and decreased range of motion (ROM).

In an August 16, 2023 emergency room note, Dr. Ferguson related that appellant had limited use of his left arm due to a rotator cuff tear. He also indicated that appellant was released to return to limited duty.

In a follow up letter dated August 18, 2023, OWCP advised appellant that it had conducted an interim review and the evidence remained insufficient to establish his claim. It informed him that he was diagnosed with arthritis of the left shoulder due to the daily performance of his duties, and also was diagnosed with a left shoulder rotator cuff tear, which could be a traumatic injury. OWCP requested clarification whether appellant was claiming an occupational injury or a traumatic injury. It noted that he had 60 days from the July 13, 2023 letter to submit the requested supporting evidence. OWCP 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. No additional evidence was received.

By decision dated September 13, 2023, OWCP found that the incident occurred as alleged, but denied appellant's claim finding that appellant failed to submit any medical evidence which contained a diagnosis in connection with the work event. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

In an October 25, 2023 report, Dr. Matthew F. Dilisio, a Board-certified orthopedic surgeon, noted that appellant presented with left shoulder pain which had been present for about a year and a half, which was exacerbated when appellant dumped trash at work on June 26, 2023. He related that appellant was dumping a large bag of trash into a dumpster, the momentum caused him to hit his shoulder, and he presented to the emergency room the following morning, secondary to an inability to raise his left arm. Dr. Dilisio diagnosed a massive geriatric rotator cuff tear with pseudo paralysis that was a subacute work-related injury.

On November 14, 2023 Dr. Dilisio performed appellant's left reverse total shoulder arthroplasty.

In a December 11, 2023 report, Dr. Dilisio recounted that he first saw appellant on October 25, 2023 for left shoulder pain and that appellant related that he was dumping a large trash bag into a dumpster and hit his shoulder. He noted that appellant underwent physical therapy, but he remained symptomatic. A magnetic resonance imaging (MRI) scan demonstrated a full-thickness retracted rotator cuff tear with muscle atrophy. Dr. Dilisio diagnosed a massive geriatric rotator cuff tear with pseudo paralysis. Regarding causation, he explained that rotator cuff pathology could be difficult to truly delineate, and opined that "[g]iven the size of his tear and radiographic appearance, he may have had preexisting rotator cuff disease; however, based on his symptoms the work-related episode that occurred on June 26, 2023, while dumping out that large trash bag, significantly aggravated his shoulder symptoms beyond that of its normal natural history." Dr. Dilisio related that appellant denied significant problems prior to the work incident and that his condition ultimately became pseudo paralysis. He further opined that, "I think he had likely an acute tear on top of anything that was chronic that directly led to him needing a shoulder replacement."

On January 3, 2024 appellant requested reconsideration.

By decision dated March 6, 2024, OWCP modified its prior denial and found that appellant provided a valid diagnosis; however, the claim remained denied as the medical evidence was insufficient to establish causal relationship between a diagnosed condition and the accepted June 26, 2023 employment incident. OWCP explained that appellant had a preexisting condition and causal relationship must be supported with affirmative evidence and medical rationale based upon a complete and accurate medical history.

On April 26, 2024 counsel for appellant requested reconsideration and submitted a February 15, 2024 initial evaluation plan of physical therapy care from Dr. Dilisio.

By decision dated May 1, 2024, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

On May 29, 2024 counsel for appellant requested reconsideration.

In a May 16, 2024 report, Dr. Dilisio related that he first saw appellant on October 25, 2023 for left shoulder pain. Appellant's August 11, 2023 left shoulder MRI scan demonstrated a massive rotator cuff tear. Dr. Dilisio recounted that he performed appellant's reverse shoulder replacement on November 14, 2023, during which the massive tear was confirmed. He explained that he prepared a letter of causation on December 11, 2023, which stated that appellant was injured at the employing establishment on June 26, 2023, when dumping a large trash bag into a dumpster. Dr. Dilisio opined that it was his medical opinion with a reasonable degree of medical certainty that the rotator cuff tear appellant sustained on June 26, 2023, was a direct result of his work-related injury while dumping out the trash. He explained that the momentum caused appellant to overload his rotator cuff and, even if a small tear was present, the work injury would have caused any type of small degenerative tear to become a large retracted massive tear which was readily evident on the MRI scan. Dr. Dilisio opined that the force of the injury when appellant swung the trash bag caused tearing of the supraspinatus and infraspinatus tendons of the left shoulder with symptoms including weakness and pain with limited ROM. He explained that the swinging of the trash bag and subsequent injury overwhelmed the load-bearing capacity of the rotator cuff tendon, causing a tear at the interface between the tendon and greater tuberosity humeral attachment and a soft tissue injury that was readily evident on the MRI scan and confirmed intraoperatively. Dr. Dilisio noted that the tear altered the biomechanics of his shoulder, correlated perfectly with his pain and disability, and required the subsequent medical care.

By decision dated June 3, 2024, OWCP modified its prior denial and found that it was unclear how the injury occurred and that it had not been provided with an accurate factual history of the incident.

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

⁴ *Supra* note 2.

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 an injury.⁸

To establish that an injury occurred as alleged, the injury need not be confirmed by eyewitnesses, but the employee's statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.⁹ In determining whether a case has been established, such circumstances as late notification of injury, lack of confirmation of injury, and failure to obtain medical treatment may, if otherwise unexplained, cast serious doubt on the employee's statements. The employee has not met his or her burden when there are such inconsistencies in the evidence as to cast serious doubt on the validity of the claim.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 an employment incident in the performance of duty on June 26, 2023, as alleged.

Appellant claimed that on June 26, 2023 he walked to the dock area to take out the trash and as he picked up a trash liner and placed it into the dumpster, he felt a twinge in his left shoulder with pain. He noted that he worked through the pain but the next morning, it had worsened with limited ROM, and he sought treatment at the emergency room. The employing establishment acknowledged that appellant was injured in the performance of duty. Dr. Dilisio in his report dated October 25, 2023 related a history of injury that on June 26, 2023 appellant swung the trash bag and hit his shoulder as he placed the trash in the dumpster. In his report dated December 11, 2023,

⁵ See *Y.S.*, Docket No. 22-1142 (issued May 11, 2023); *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.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 See *C.J.*, Docket No. 23-0997 (issued January 17, 2024); *S.W.*, Docket No. 17-0261 (issued May 24, 2017).

¹⁰ *D.F.*, Docket No. 21-0825 (issued February 17, 2022); *Betty J. Smith*, 54 ECAB 174 (2002).

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

Dr. Dilisio clarified that when appellant swung the trash bag it caused a tearing of the supraspinatus and infraspinatus tendons of the left shoulder with symptoms including weakness and pain with limited ROM. The Board finds that Dr. Dilisio consistently maintained that appellant was injured when swinging a trash bag and placing it in the dumpster. The Board therefore finds that an incident occurred on June 26, 2023, as alleged.

As appellant has established that the June 26, 2023 employment incident occurred as alleged, the question becomes whether this incident caused an injury.¹² Thus, the Board will set aside OWCP's June 3, 2024 decision and remand the case for consideration of the medical evidence. Following any further development as deemed necessary, OWCP shall issue a *de novo* decision addressing whether appellant has met his burden of proof to establish 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 June 26, 2023, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the June 3, 2024 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: September 12, 2024
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

¹² See *S.T.*, Docket No. 21-0317 (issued August 11, 2021); *B.S.*, Docket No. 19-0524 (issued August 8, 2019).