United States Department of Labor
Employees' Compensation Appeals Board

L.G., Appellant	)	
and	)	**Docket No. 21-0343**
	)	**Issued: May 9, 2023**
U.S. POSTAL SERVICE, MEXICO POST OFFICE, Mexico, MO, Employer	)	

Appearances:
Sarah Holden, Esq., for the appellant[1]
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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 4, 2021 appellant, through counsel, filed a timely appeal from a July 16, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.

ISSUE

The issue is whether appellant has met his burden of proof to establish a traumatic injury in the performance of duty on October 17, 2017, as alleged.

[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*.

FACTUAL HISTORY

On November 14, 2017 appellant, then a 61-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on October 17, 2017 at 1:00 p.m. he dislocated his left shoulder when lifting a bundle of mail from the back seat to the front seat while in the performance of duty. On the reverse side of the claim form, the employing establishment contended that appellant was not in the performance of duty when his injury occurred. It asserted that his injury was caused by his willful misconduct, as his injury occurred while he was off the clock and in his own home. Appellant stopped work on October 17, 2017. OWCP assigned the present claim OWCP File No. xxxxxx434.

In a November 17, 2017 letter, the employing establishment controverted appellant's claim, explaining that appellant informed his supervisor that on October 16, 2017 he had been lifting weights the previous night and injured his left shoulder when he was required to drop the weights off of his chest. He contacted the employing establishment to request that a substitute complete his route as he intended to go to the doctor to have his left shoulder examined. Appellant's doctor then informed him that he would need to be off from work for three months. The employing establishment contended that because he did not have enough leave accumulated to cover that much time off, he was now claiming that his injury occurred while he was on the job. It asserted that each time he was asked about the incident he changed his story. The employing establishment claimed that appellant sent a text message to his supervisor indicating that he lied during the initial interview. It further claimed that appellant's wife had contacted his supervisor asking him to do appellant a favor with regard to his claimed injury. It noted that he had previously filed an occupational disease claim (Form CA-2) on October 24, 2017 for a shoulder injury he allegedly sustained on February 1, 2017.[3]

In a separate letter dated November 17, 2017, the employing establishment noted that appellant also filed an occupational disease claim for a left shoulder injury under OWCP File No. xxxxxx962. It observed that he had been experiencing pain in his shoulder for the previous six to eight months and argued that he had not been forthright in conveying the circumstances of his claimed injury. The employing establishment also attached an undated statement from R.N., appellant's supervisor, wherein he explained that on October 17, 2017 appellant approached him and requested that someone be called to carry his route, as he had been lifting weights the night before and had to use his left arm to push weights off of his chest when he was unable to lift them while bench pressing. In the process of pushing the weights, appellant injured his left shoulder. Later that day, he again called and informed R.N. that he needed someone to complete his route because he was going to visit the emergency room as he believed he had torn something in his left shoulder. Appellant returned to work, repeating his explanation about his left shoulder being injured while lifting weights and informed R.N. that he would need to be out of work for a few days. R.N. also noted that he had several calls with appellant where he claimed that he injured his left shoulder prior to his weightlifting incident and that it was an ongoing issue since February 2017. He then sent a text message in which he clarified that the weightlifting incident was fabricated and that he was originally too ashamed to inform him that he had injured himself while carrying mail. Appellant again changed his story claiming that his injury occurred while he

[3] On October 24, 2017 appellant filed a Form CA-2 for a torn left rotator cuff under OWCP File No. xxxxxx962. On March 16, 2018 OWCP advised him that his claim had been closed and that his injury claim would be developed under the present traumatic injury claim. It subsequently administratively combined the prior claim, OWCP File No. xxxxxx962, with the present claim, OWCP File No. xxxxxx434, with the latter serving as the master file.

was on his route the day he went to the emergency room. R.N. also noted that appellant was an avid weightlifter and talked openly about his daily workouts.

In a November 17, 2017 duty status report (Form CA-17), Dr. Nathan Skelley, a Board-certified orthopedic surgeon, diagnosed a left traumatic subscapularis tear due to the alleged October 17, 2017 employment incident.

In a development letter dated November 21, 2017, OWCP informed appellant of the deficiencies of his claim. It advised him the type of factual and medical evidence needed and provided a questionnaire for his completion. OWCP afforded appellant 30 days to submit the necessary evidence.

OWCP subsequently received an October 26, 2017 medical report, wherein Dr. Skelley noted his evaluation of appellant for left shoulder pain. Appellant asserted that he had completed his regular workout routine on the morning of October 17, 2017 before going to work and that he had previously experienced minor aches and pains in his left shoulder from a history of manual work and athletics. He informed his supervisor of his left shoulder pain, but when his supervisor offered to find someone to work his route for him, he declined. Appellant later reached for a bundle of mail weighing approximately 35 pounds when he felt a sharp sting and burn in his left anterior and posterior shoulder. On examination and review of an October 20, 2017 magnetic resonance imaging (MRI) scan of his left shoulder, Dr. Skelley diagnosed an acute left subscapularis tear with a partial supraspinatus tear and labral tears. He recommended that appellant undergo surgery to treat his condition.

On October 31, 2017 Dr. Skelley performed a left shoulder open subscapularis repair to treat appellant's left shoulder subscapularis tear and biceps subluxation possible tear.

In a November 9, 2017 narrative medical report, Dr. Skelley diagnosed a left acute subscapularis tear with bicep tendon subluxation, a left partial supraspinatus tear and a superior glenoid labrum lesion of the left shoulder. He explained that, based on a review of the history of appellant's injury, his physical findings and imaging results, the alleged October 17, 2017 employment injury to his left shoulder contributed to the excessive strain on his left shoulder which exceeded his tissue strength and caused his left subscapularis tear with bicep tendon subluxation. Dr. Skelley noted that, prior to his injury, appellant had only experienced minor aches and pains and had no significant injuries or surgeries. He recounted the events of the alleged October 17, 2017 employment incident in which appellant first experienced a slight irritation in his left shoulder during his morning workout before he went to work and performed strenuous and physically demanding activities. After working approximately six to eight hours, appellant attempted to move a bundle of mail weighting 35 pounds with his left arm when he experienced a sharp pain in his left shoulder. Dr. Skelley detailed the muscles contained in the shoulder and explained that, when a person may have some preexisting damage in the shoulder, a force that exceeds the strength of a tendon or muscle can cause a rotator cuff tear. He concluded that the weight of the bundle of mail and the angle at which appellant attempted to lift it made his shoulder more susceptible to the acute injury.

In a November 9, 2017 response to OWCP's development questionnaire, appellant alleged that on October 17, 2017 he reached into the backseat of his work vehicle to grab a bundle of mail and felt an immediate sharp pain in his left shoulder. He noted that earlier that morning he experienced a slight irritation in shoulder after completing his morning workout. Although his

shoulder was irritated, appellant did not believe it was significant enough for him to miss work. As he cased mail and sorted mail and lifted packages that day, he began to experience pain in his shoulder. Appellant informed his supervisor of his pain, but elected to continue his work when his supervisor offered to call someone else in to complete the route. He asserted that it was during the route that he had injured his left shoulder. Appellant subsequently went into the office on October 24, 2017 to file his injury claim, where he later realized he was given a Form CA-2 instead of a Form CA-1. He advised that he did not sustain any other injury to his left shoulder after the October 17, 2017 injury and clarified that, although he experienced discomfort in his left shoulder, it had been tolerable and never posed an issue in the performance of his employment duties. Appellant related that he exercised five times a week in order to strengthen his shoulder, and noted that he previously experienced minor aches and pains that he attributed to a history of performing manual work and athletics.

On November 13, 2017 appellant was examined on postoperative follow up by Dr. Skelley. He reviewed postoperative treatment instructions and recommended appellant begin a light physical therapy regiment.

Appellant submitted a December 13, 2017 statement where he again explained the events of the alleged October 17, 2017 employment incident. He described his regular employment duties as sorting and casing mail and packages as well as lifting and pulling down trays of mail. Appellant indicated that he worked out five days a week to remain healthy. He clarified that he did not injure himself on October 16 or 17, 2017 when he was lifting weights, only that his shoulder was slightly irritated. Appellant claimed that, although his shoulder was irritated, it was not significant enough to prevent him from performing his employment duties. He then injured his left shoulder during his route later that day, noting that the pain was much worse than what he had been experiencing earlier in the day. When asked about appellant's use of the date February 1, 2017 on his Form CA-2, appellant further explained that, although he had previously experienced discomfort in his shoulder, it had been tolerable and did not cause him any issues with his work.

In a separate statement also dated December 13, 2017, appellant responded to the employing establishment's controversion. He claimed that he did not call his supervisor to inquire whether a substitute could perform his route as he was already at work by the time his supervisor arrived. Appellant asserted that he performed his normal duties without issue until around 1:00 p.m. on the date of the alleged employment incident when he tore a muscle while reaching for a bundle of mail. He noted that he did not contact his supervisor before that time and that he never informed his supervisor that he injured his shoulder lifting weights, nor had he ever bragged about it on the internet. Appellant also indicated that his supervisor's explanation that he was ashamed to admit he injured his shoulder lifting mail was a complete fabrication and that his supervisor created his own version of the events when appellant informed him that his shoulder was irritated.

In a December 28, 2017 statement, appellant explained that his original Form CA-2 was filed by mistake and that he had never injured his shoulder prior to October 17, 2017. He asserted that he did not understand the process for filing a claim and that, when his supervisor constantly asked him how long his shoulder had been irritated, he told him six-to-eight weeks, although it had never been bad enough for him to miss work. Appellant claimed that he had no problems with his shoulder on October 16, 2017 and was able to carry out all of his regular work duties. On October 17, 2017 he was performing his duties for approximately two hours before he began to experience shoulder pain and asked his supervisor to call in a substitute to complete his route. Appellant noted that he only told his supervisor that he performed his normal workout that morning

and that his shoulder felt irritated. He did not speak to anyone else about his shoulder or tell them that he dropped any weight on his chest.

By decision dated April 6, 2018, OWCP denied appellant's traumatic injury claim, finding that the evidence of record was insufficient to establish that the injury and/or events occurred as he described. It concluded, therefore, that the requirements had not been met to establish an injury as defined by FECA.

On January 16, 2019 appellant, through counsel, requested reconsideration of OWCP's April 6, 2018 decision and submitted a statement in support of his request. He recounted that on October 17, 2017 he felt a slight irritation in his left shoulder during his morning workout but it was not of issue enough to where he could not work. Appellant related that, while sorting through mail and lifting packages later that day at work, he developed more pain in his shoulder, so he informed R.N. that his shoulder was slightly irritated after his morning workout and requested that a substitute be called to deliver his route. When he learned that his substitute was unavailable, he completed his route. Appellant related that at 1:00 p.m., he injured his left shoulder when he reached back for a bundle of mail and felt a sharp pain and burning sensation much worse than the irritation he experienced earlier.

OWCP subsequently received an October 17, 2017 report, wherein Sherry Clawson, a nurse practitioner, evaluated appellant for left shoulder pain and diagnosed a shoulder injury. In a diagnostic report of even date, Dr. Randall Olsen, a Board-certified radiologist, performed an x-ray of appellant's left shoulder, revealing no acute findings.

In an October 24, 2017 employing establishment accident report, appellant noted that he experienced discomfort in his left shoulder for a while, but it had been tolerable and never posed an issue with him performing his job. He explained that he worked out five days per week on a lower rate scale in order to strengthen his shoulder. Appellant performed his normal employment duties that morning until he requested a substitute to finish his route that day. When he learned that his substitute was unavailable, he decided to complete his route. At approximately 1:00 p.m., appellant related that he was moving a mail bundle from the back of the vehicle to the front seat when he felt a sharp pain in his left shoulder that prevented him from completing his route. Thereafter, he informed his supervisor of his injury and went to the emergency room.

In an April 16, 2018 witness statement, M.C., appellant's coworker, explained that on the morning of October 17, 2017, appellant was at work by the time she reported for duty at 6:30 a.m. She observed that he was able to perform his normal employment duties with no indication that he had any problems. Prior to appellant loading his vehicle, M.C. overheard him ask R.N. to call his substitute to carry his route because his arm had been bothering him. Later that day, R.N. called her to inform her that she may have to help with appellant's route because he "blew out his arm." Appellant sent a picture of his bruised shoulder to M.C. later that evening, and she subsequently forwarded the picture to R.N.

In a May 3, 2018 statement, S.W., appellant's coworker, explained that appellant's wife came into the employing establishment on November 13, 2017 to speak with R.A. about his injury.

By decision dated June 14, 2019, OWCP denied modification of its April 16, 2018 decision.

On April 22, 2020 appellant, through counsel, requested reconsideration of OWCP's June 14, 2019 decision. No additional argument or evidence was received.

On July 16, 2020 OWCP denied modification of its June 14, 2019 decision.

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 October 17, 2017, 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] Herein, appellant recounted the details of the alleged October 17, 2017 employment incident in which he asserted that he further aggravated his left shoulder while performing his regular employment duties of casing mail and lifting packages for several hours. He recounted that he performed these duties without incident before his shoulder worsened to the point that he requested a substitute to complete the delivery of his route. Upon learning that his regular substitute was unavailable, appellant continued his route until approximately 1:00 p.m. when he reached into the back seat, lifted a bundle of mail weighing around 35 pounds, and experienced a sharp pain in his left shoulder. He immediately contacted R.N. to inform him that he had injured his shoulder and was unable to complete his route for the day. Appellant subsequently returned to the employing establishment before leaving to go to the emergency room.

Additionally, witness statements support appellant's account of the October 17, 2017 employment incident. In an April 16, 2018 statement, M.C. confirmed that on the morning of October 17, 2017 appellant performed his normal employment duties without any indication that he had any problems with his shoulder. Moreover, the record consistently demonstrates that appellant sought prompt medical care the same day, including evaluation in the emergency room and an x-ray of his left shoulder.

Dr. Skelley's subsequent medical reports also relate a consistent history of injury in which appellant experienced minor aches and pain in his left shoulder after working out the morning of October 17, 2017 and subsequently experienced a sharp pain in the same shoulder when he attempted to lift a bundle of mail weighing approximately 35 pounds while at work.

The Board notes that the injuries appellant claimed are consistent with the facts and circumstances he set forth, his course of action, and the medical evidence he submitted. Further, the history of the employment incident was confirmed by Dr. Skelley's contemporaneous medical reports. While the employing establishment controverted appellant's claim, it did not provide sufficient evidence to cast serious doubt on the validity of his claim. The Board thus finds that appellant has met his burden of proof to establish an employment incident in the performance of duty on October 17, 2017, as alleged.

[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] *Id*.

As appellant has established that the October 17, 2017 employment incident factually occurred as alleged, the question becomes whether the incident caused an injury.[15] Since OWCP found that appellant had not established fact of injury, it did not evaluate the medical evidence. The Board, therefore, will set aside OWCP's July 16, 2020 decision and remand the case for consideration of the medical evidence of record.[16] After 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 17, 2017 employment incident.

CONCLUSION

The Board finds that appellant has met his burden of proof to establish a traumatic incident in the performance of duty on October 17, 2017, as alleged.

ORDER

IT IS HEREBY ORDERED THAT the July 16, 2020 decision of the Office of Workers' Compensation Programs is reversed. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 9, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

[15] *Id*.

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