

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RAYMOND JAMES THOMPSON and DEPARTMENT OF DEFENSE,
CAMP LEJEUNE DEPENDENTS SCHOOLS, LEJEUNE HIGH SCHOOL,
Camp Lejeune, NC

*Docket No. 99-1818; Submitted on the Record;
Issued October 13, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether appellant sustained an injury in the performance of duty on April 8 1997, as alleged.

On May 1, 1997 appellant, then a 56-year-old science teacher, filed a traumatic injury claim (Form CA-1) alleging that on April 8, 1997 he sustained a left knee injury. He asserted that he wrenched his left knee because his eyeglasses prevented him from focusing on a slope in the ground when he stepped through a garden. Appellant also alleged that he wrenched his left knee on April 11, 1997 when he tripped over roots on a nature trail while on a field trip. On the reverse side of the claim form, appellant's supervisor indicated by checkmark that appellant was not injured in the performance of duty and her knowledge of appellant's alleged injury did not agree with appellant's and/or witness's statements. His supervisor noted that her receipt of the claim form was the only information she received indicating that appellant's alleged injury was work related. Appellant stopped work on April 28, 1997 and resigned from his position effective May 23, 1997. The record also shows, however, that appellant was terminated effective May 23, 1997 for reasons unrelated to his claim.

To support his claim, appellant submitted hospital forms dated April 13, 1997 noting that appellant complained of left knee and calf swelling.¹ He reported a history of stepping in a hole and stepping on a nail one week previously and a diagnosis of probable gastrocnemius strain of the left calf was made. Appellant also submitted a venous duplex imaging report from Dr. Lennox Williams, a Board-certified surgeon, dated April 15, 1997, which showed no evidence of deep venous thrombosis in appellant's left lower extremity. Dr. Williams also found a Baker's cyst and mild cellulitis in the subcutaneous tissue. Appellant further submitted a report from Dr. Michael Josilevich, a Board-certified internist, dated April 28, 1997. In his

¹ The doctor's signature is illegible.

report, Dr. Josilevich noted severe tenderness and mild swelling in appellant's left knee and calf. He also noted appellant's range of motion. Dr. Josilevich's impressions were "left knee trauma exacerbation by recent fall and playing golf with most probably twisting of the knee" and "left knee Baker's cyst."

Additionally, appellant submitted numerous reports and notes from Dr. Ralph J. DiFiore, a Board-certified orthopedic surgeon, dated May 1 to August 20, 1997. In his report dated May 1, 1997, Dr. DiFiore stated that appellant reported that he stepped in a hole and twisted his knee at work on April 8, 1997 and that he noticed increased pain and swelling the following day. Dr. DiFiore found traumatic effusion of the left knee and a possible medial meniscus tear. In his report dated May 5, 1997, Dr. DiFiore noted that appellant reported "very little pain" and that he had mild effusion without joint line tenderness. He diagnosed traumatic left knee synovitis but stated that he could not rule out internal derangement due to torn cartilage. In his report dated May 9, 1997, Dr. DiFiore noted mild knee effusion and diagnosed a torn medial meniscus of the right knee.² He discussed possible arthroscopic surgery. In a discharge summary dated May 14, 1997, Dr. DiFiore discussed appellant's surgery on that date and diagnosed a radial medial meniscus tear, chondromalacia patella and suprapatellar plica. In a second report dated May 14, 1997, he discussed the details of appellant's surgery performed on that date. In his report dated May 19, 1997, Dr. DiFiore noted effusion and that appellant reported continued severe pain. Dr. DiFiore diagnosed status post-arthroscopic debridement of a radial medial meniscus tear, chondromalacia patella, and sprapatllar plica. In his reports dated June 10 to August 10, 1997, he discussed appellant's recovery from arthroscopic surgery. In his treatment note dated August 20, 1997, Dr. DiFiore stated that appellant could return to light-duty work.

Appellant submitted an attending physician's report (Form CA-20) and attending physician's supplemental report (Form Ca-20a) from Dr. DiFiore dated August 20, 1997. In both reports Dr. DiFiore indicated by checkmark that appellant's condition was caused or aggravated by an employment activity. In his attending physician's report, he noted appellant's diagnoses and dates of treatment. Dr. DiFiore also noted that appellant was totally disabled from April 8 to August 20, 1997 and was partially disabled from August 20 to October 6, 1997.

Appellant also submitted narrative statements from his coworkers dated May 9, 1997. In her statement, Ms. Little noted that "a few weeks ago" appellant complained of pain and swelling in his left calf and asked her to examine his left lower leg. She, a registered nurse, noted slight swelling of the knee and that appellant did not relate a history of injury to her. Ms. Little encouraged appellant to seek medical advice from a physician as his pain and swelling seemed to have no cause. In her statement, Melba Roelofs stated that on an unknown date she noticed that appellant's calf was swollen. Ms. Roelofs noted that appellant complained of tightness and pain but he could not remember the cause of his alleged injury.

² The Board notes that Dr. DiFiore referred to appellant's right knee in his May 9, 1997 report but discussed appellant's left knee in the remainder of his reports. Therefore, the Board infers that his May 9, 1997 reference was erroneous.

By letter dated May 22, 1997, the employing establishment controverted appellant's claim on the grounds that evidence of record raised doubt as to the occurrence of the alleged April 8, 1997 employment incident.

A memorandum of conference dated June 25, 1997 reveals that appellant asserted that on April 8, 1997 he stepped into a deep trench and twisted his knee in the employing establishment's garden. He stated that he did not think anything of the incident at the time it occurred but his calf and ankle swelled that evening. Appellant also stated that he twisted his knee again several days later while on an employing establishment field trip thereby exacerbated his original injury. He reported that he went to the hospital on April 13, 1997 and that he stepped on a nail the previous week. Appellant asserted that a medical report stating that he played golf was inaccurate and that he only coached golf. He also asserted that his supervisor was not at the employing establishment the week of the alleged April 8, 1997 employment incident but he told the assistant principal that he wrenched his knee and stepped on a nail but did not know which incident caused his condition. Appellant stated that he underwent surgery on May 14, 1997 with a traumatic meniscus tear diagnosis. He also stated that he then realized that his condition was caused by the alleged April 8, 1997 employment incident.

By letter dated July 9, 1997, the employing establishment responded to the June 25, 1997 memorandum of conference. Eric L. Steimel, the assistant principal at the employing establishment, asserted that he "did not recall" appellant reporting the alleged April 8, 1997 employment incident or other injury to him.

In an undated statement, appellant responded to the June 25, 1997 memorandum. Appellant stated that his condition was not diagnosed as a traumatic injury until May 1, 1997.

By decision dated August 27, 1997, the Office denied appellant's claim on the grounds that the evidence of record failed to establish that he sustained an injury in the performance of duty on April 8, 1997, as alleged. The Office found that appellant did not establish that his April 8, 1997 injury occurred at the time, place and in the manner alleged.

By letter dated August 10, 1998, appellant requested reconsideration of the Office's August 27, 1998 decision denying his claim. To support his request, he submitted a report from Dr. DiFiore dated December 12, 1997. In his report, Dr. DiFiore stated that appellant sustained a work-related left knee injury on April 8, 1997 "when he stepped in a hole and twisted the knee." He also noted the history of appellant's left knee injury, including symptoms and treatment. Appellant also submitted a letter from his attorney dated May 12, 1998 advising appellant of his right to request reconsideration of the Office's August 27, 1997 decision.

Appellant further submitted narrative statements from his coworkers dated July 31 to August 18, 1998. In his statement dated July 31, 1998, William Holt stated that on or about April 8, 1997, appellant informed him that he injured his "lower leg" when he stepped into a hole during a school horticulture activity and later tripped over exposed roots while on a nature walk with students. In her statement dated August 3, 1998, Shirley J. Bryan stated that appellant informed her on April 9 or 10, 1997 that he made a misstep in the employing establishment's garden. In her statement dated August 4, 1998, Sterling B. Williams stated that appellant told her he stepped in a hole while working in the employing establishment's garden, causing him to

twist his knee. Ms. Williams also stated that she witnessed appellant trip on tree roots while walking on a nature trail during a field trip. She noted that appellant complained of pain following both incidents. In his statement dated August 18, 1998, Mike Smith stated that he noticed appellant limping and appellant told him that he injured his leg while working with students in the garden.

By decision dated September 15, 1998, the Office affirmed its prior decision on the grounds that the evidence submitted in support of appellant's request for reconsideration was insufficient to warrant modification of that decision. The Office conducted a merit review and found that the evidence submitted in support of appellant's reconsideration request did not overcome the inconsistencies of his claim because his coworkers did not witness appellant's alleged April 8, 1997 employment injury and Dr. DiFiore's December 12, 1997 report was repetitive and inconsistent with Dr. Josilevich's report, which was most contemporaneous with appellant's alleged injury.

The Board finds that appellant established the occurrence of the employment incident on April 8, 1997, as alleged, but the case is not in posture for decision on the issue of whether he met his burden of proof to establish that he sustained an injury in the performance of duty on April 8, 1997.³

An employee seeking benefits under the Federal Employees' Compensation Act⁴ has the burden of establishing 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 the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged, and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.⁵ Regardless of whether the asserted claim involves traumatic injury or occupational disease, an employee must satisfy this burden of proof.⁶

To determine whether an employee satisfied his or her burden of proof, the Office first considers whether the employment incident occurred at the time, place and in the manner alleged.⁷ Second, the Office must determine whether there is a causal relationship between the employment incident and the disability and/or condition for which compensation is claimed.⁸

³ This is the second appeal in this case. On March 2, 1999 appellant filed an appeal indicating that he sought review of the Office's August 27, 1997 decision. The appeal was docketed as No. 99-718. The Board issued an order dismissing that appeal on the grounds that it was untimely filed. By letter dated May 3, 1999, appellant asserted that his March 2, 1999 appeal sought review of the Office's decision dated September 15, 1998. He resubmitted an application for review Form (AB-1) stating that he sought review of the Office's decision dated September 15, 1998. Appellant's second appeal was docketed as No. 99-1818.

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁶ *See Ronald K. White*, 37 ECAB 176, 178 (1985).

⁷ *Shirley A. Temple*, 48 ECAB 404, 407 (1997); *Elaine Pendleton*, *supra* note 5 at 1145.

⁸ *See Elaine Pendleton*, *supra* note 5 at 1147.

An employee may satisfy the burden of proof establishing that the employment incident occurred as alleged, but fail to show that his or her disability and/or condition is related to that incident.

The Office cannot accept fact of injury if there are such inconsistencies in the evidence as to seriously question whether the specific event or incident occurred at the time, place and in the manner alleged, or whether the alleged injury was in the performance of duty.⁹ Nor can the Office find fact of injury if the evidence fails to establish that the employee sustained an “injury” within the meaning of the Act. 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, as alleged, but the employee’s statements must be consistent with surrounding facts and circumstances and his subsequent course of action.¹⁰ 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 cast doubt on an employee’s statements in determining whether he or she has established his or her claim.¹¹ An employee’s statement 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.¹²

Appellant’s claim is consistent with the facts of the case and his subsequent course of action. There are no discrepancies, inconsistencies or contradictions in the evidence which create serious doubt that the incident occurred as alleged on April 8, 1997. Although appellant did not file his claim form until May 5, 1997, the evidence of record supports his allegation that the April 8, 1997 employment incident occurred at the time, place and in the manner alleged. The hospital form dated April 13, 1997 stating that appellant stepped in a hole does not negate appellant’s assertion that the employment incident occurred at the time, place and in the manner alleged. Similarly, Dr. Josilevich’s April 28, 1997 report noting that appellant’s left knee condition was exacerbated by a subsequent fall and playing golf does not mean that the April 8, 1997 employment incident did not occur as alleged. Dr. DiFiore’s numerous reports and notes dated May 1 to August 20, 1997 were consistent with appellant’s claim. In his reports dated May 1 and December 12, 1997, the doctor specifically noted that appellant informed him that he stepped in a hole and twisted his knee at work on April 8, 1997. Narrative statements by appellant’s coworkers are also consistent with his claim. Ms. Little’s and Ms. Roelofs’s statements that appellant did not relate a history of injury does not cast serious doubt upon the validity of appellant’s claim as they do not refute his allegation that the April 8, 1997 employment incident occurred at the time, place and in the manner alleged. The memorandum of conference dated June 25, 1997 reveals that appellant’s statements on that date did not conflict with his claim as he reiterated his prior statements. Mr. Steimel’s statement dated July 9, 1997 that he “did not recall” that appellant reported the April 8, 1997 employment incident to him does not contradict appellant’s claim as it fails to affirmatively deny that appellant reported the employment incident or that the incident occurred. The remaining statements by appellant’s

⁹ *Id.*

¹⁰ See Shirley A. Temple, *supra* note 7 at 407; Joseph H. Surgener 42 ECAB 541, 547 (1991).

¹¹ See Shirley A. Temple, *supra* note 7 at 407; Constance G. Patterson, 41 ECAB 206 (1989).

¹² Margarita Bell, 48 ECAB 172, 176 (1996).

coworkers support his contention that he twisted his knee while working in the employing establishment's garden on April 8, 1997. The evidence of file does not cast serious doubt upon appellant's claim.

As appellant satisfied his burden of proof in establishing that the April 8, 1997 employment incident occurred at the time, place and in the manner alleged, the case will be remanded to the Office to determine whether the medical evidence establishes that appellant sustained a traumatic injury causally related to the April 8, 1997 employment incident. After any further development deemed necessary, the Office will issue a decision regarding the causal relationship issue.¹³

The decision of the Office of Workers' Compensation Programs dated September 15, 1998 is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Dated, Washington, DC
October 13, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

¹³ The record supports appellant's assertion that he sustained a fall while on a work-related field trip on April 11, 1997.