United States Department of Labor
Employees' Compensation Appeals Board

K.W., Appellant	)	
and	)	**Docket No. 07-2147**
	)	**Issued: April 17, 2008**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Salisbury, NC, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 20, 2007 appellant filed a timely appeal from the decision of the Office of Workers' Compensation Programs dated September 15, 2006 and the hearing representative's decision of February 8, 2007, which denied appellant's claim for benefits as fact of injury in the performance of duty was not established. He also filed a timely appeal from the June 13, 2007 decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits and nonmerits of this case.

ISSUES

The issues are: (1) whether appellant has established an injury in the performance of duty on or about July 17, 2006; and (2) whether the Office properly denied appellant's request for a merit review.

FACTUAL HISTORY

On July 31, 2006 appellant, then a 53-year-old housekeeping aid, filed a traumatic injury, claim asserting that on July 18, 2006 at 18:45 while cleaning a restroom, he injured his foot and right side. In the supervisor's report on the claim form, it was indicated that the date of the injury was July 18, 2006 at 18:45 and that notice was also received on July 18, 2006. A box was also checked by the supervisor indicating that appellant was injured in the performance of duty. By letter dated August 10, 2006, the employing establishment controverted the claim.

In a statement dated August 2, 2006, Edie Decker, human resources assistant for the employing establishment, indicated that on July 31, 2006 appellant came to her office and stated that he had a hernia which was work related and a problem with his foot. Appellant indicated that the injuries "occurred as a result of getting on the floor and attempting to reach behind and under toilets when cleaning." He told Ms. Decker that he was unaware of the exact date and time and that she advised him to get together with his supervisor and file a claim. Appellant informed Ms. Decker that he had no insurance. Ms. Decker was informed by appellant later that day that he completed the claim form.

In an undated statement received by the Office on August 14, 2006, Barron Monroe, appellant's supervisor, indicated that on July 18, 2006 at about 3:25 p.m. he got a call from appellant, who indicated that he had back pains and would be taking sick leave and leave under the Family and Medical Leave Act (FMLA). He stated that appellant told him that he was cleaning the tubs and walls in restrooms and got back pain. Mr. Monroe noted that he was going to put appellant on three days of light duty, but that he took three days leave under the FMLA.

In notes submitted on forms of the employing establishment, appellant appeared to be treated on July 19, 2006 at their clinic. He indicated that on Tuesday morning he awoke "hurting everywhere." Appellant told the writer that he was washing out tubs on Monday, July 17, 2006 when he felt pain in his back and right foot and the arthritis in his right hand was "acting up."

By letter dated August 10, 2006, the employing establishment controverted the claim. In a note dated August 11, 2006, the employing establishment indicated that, on the date of the alleged injury, Tuesday, July 18, 2006, appellant was on leave the entire day. The employing establishment attached a copy of appellant's time card which indicated that he took leave on July 18, 2006. In fact, appellant took off that Wednesday, Thursday and Friday as well. The time card also indicated that appellant worked on Monday, July 17, 2006 on shift two from 3:30 p.m. until midnight.

In an August 31, 2006 report, Dr. Darlington Hart, a Board-certified internist, assessed appellant with back pain, arthralgia of unspecified site and extremity pain.

In a statement received by the Office on September 14, 2006, appellant indicated that he received his injury on July 17, 2006 in Building 13 when he was cleaning underneath the sink behind the toilet on the first floor. He indicated: "I was bending down to clean that area when I received pain coming from [left] foot and right side of lower back and front area of my personal part, then at that time I got up and stood for a minute and seems like the pain went away[.] I

continue to do the rest of my duties and the next morning when I woke up I couldn't walk[.] I had to get [assistance] to help me out of bed."

By decision dated September 15, 2006, the Office denied appellant's claim finding that, although the evidence supported that the claimed event occurred, there was no medical evidence that provided a diagnosis that could be connected to the events.

On October 6, 2006 appellant requested review of the written record by an Office hearing representative. In support thereof, he submitted a report dated September 13, 2006 wherein Dr. Roxanne Burgess, a podiatrist, stated that appellant was allowed to return to work with restrictions of no squatting and sedentary job for 50 percent of the day. Dr. Burgess noted that the bunions were not caused by appellant's job but it was unknown if the activity described by appellant aggravated the condition. She did note that squatting, walking for long periods of time or standing for long periods can be very painful for appellant.

On September 14, 2006 appellant was first seen by Dr. Bryan Springer, a Board-certified orthopedic surgeon, who indicated that appellant had an injury at work on July 18, 2006 when he was underneath the sink doing some work and that when he got up he noticed right-sided leg pain that began in his back and radiated around to his groin. Dr. Springer noted that he wanted to rule out an upper lumbar spine radiculopathy that is causing him to get this radiating-type pain from his back into his groin. He also wanted a clinical and physical examination for perhaps an inguinal hernia. In a September 28, 2006 report, Dr. Springer suspected appellant's symptoms could be related to a ventral abdominal hernia or an inguinal hernia and made arrangements for him to see a general surgeon. In an October 9, 2006 progress note, Dr. James A. Watkins, a Board-certified orthopedic surgeon, indicated that appellant had a work-related right inguinal hernia. Appellant had surgery on October 30, 2006 for an inguinal hernia repair.

By decision dated February 8, 2007, the hearing representative affirmed the Office's September 15, 2006 decision. The hearing representative found that discrepancies with regard to the date of the injury and the mechanism of the injury cast doubt on whether the incident occurred on the date and in the manner alleged.

By letter dated April 18, 2007, Donna M. Killip, a certified legal nurse consultant, filed a "Request for an Appeal and/Re-Review." She asked that the Office recognize an on-the-job injury that occurred on July 17, 2006 at 18:45 and that appellant needed compensation coverage until he was able to return to work in his preinjury status. Ms. Killip reviewed appellant's medical history and the history of the work incident. A representative form was received by the Office on May 18, 2007.

By decision dated June 13, 2007, the Office denied reconsideration without review of the merits. The Office determined that, as the evidence submitted in support of the request for reconsideration was immaterial to the issue at hand, *i.e.*, whether the incident occurred as alleged, appellant's request for reconsideration was insufficient to warrant review of the prior decision.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[1] has the burden of establishing that 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.[2] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or occupational disease.[3]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must be determined whether a 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, place and in the manner alleged.[4] In some traumatic injury cases this component can be established by an employee's uncontroverted statement on the Form CA-1.[5] An alleged work incident does not have to be confirmed by eyewitnesses in order to establish that an employee sustained an injury in the performance of duty, but the employee's statement must be consistent with the surrounding facts and circumstances and his subsequent course of action.[6] A consistent history of the injury as reported on medical reports, to the claimant's supervisor and on the notice of injury can also be evidence of the occurrence of the incident.[7] An employee has not met his or her burden of proof in establishing the occurrence of an injury when there are such inconsistencies in the evidence as to cast serious doubt upon the validity of the claim.[8] 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 doubt on an employee's statements in determining whether a *prima facie* case has been established.[9] Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.[10]

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[1] 5 U.S.C. §§ 8101-8193.

[2] *Joe D. Cameron*, 41 ECAB 153 (1989); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[3] *Victor J Woodhams*, 41 ECAB 345 (1989).

[4] *John J. Carlone*, 41 ECAB 354 (1989).

[5] *Id.*

[6] *Rex A. Lenk*, 35 ECAB 253, 255 (1983).

[7] *Id.* at 255, 256.

[8] *Betty J. Smith*, 54 ECAB 174 (2002).

[9] *Linda S. Christian*, 46 ECAB 598 (1995).

[10] *Id*. For a definition of the term injury, *see* 20 C.F.R. § 110.5(a)(14).

ANALYSIS -- ISSUE 2

Appellant, a housekeeping aid, alleged that he sustained an injury to his foot and "right side" as a result of an incident that occurred while cleaning the restrooms. Although the Office found in its September 15, 2006 decision that the claimed event occurred, the hearing representative disagreed and denied appellant's claim as he failed to establish that the incident occurred as alleged. Specifically, the hearing representative found that discrepancies with regard to the date of the injury and the mechanism of the injury cast doubt on whether the incident occurred on the date and in the manner alleged.

The Board finds that, although there were discrepancies in the record with regard to the date of the incident and the exact mechanism as to how the injury occurred, these minor discrepancies are not sufficient to cast doubt on the validity of appellant's claim. When appellant first went to see Ms. Decker, the human resources assistant for the employing establishment on July 31, 2006, he admitted that he was not sure of the exact date of the injury. Ms. Decker advised him to "get together with his supervisor and file a claim." On that date appellant filed his claim alleging that the incident occurred on July 18, 2006 and the supervisor also noted this date on the claim form. Later, the supervisor converted the claim by indicating that appellant was not at work on July 18, 2006. However, a careful review of the record leads to the conclusion that appellant made a simple mistake in claiming that the injury occurred on July 18, 2006 and that there is sufficient evidence that the date of injury was in fact July 17, 2006. Appellant's supervisor indicated that on July 18, 2006 he got a call from appellant who indicated that he had back pains and would be taking leave for that date. Appellant's time sheet notes that he took leave on July 18, 2006 but worked on Monday, July 17, 2006 on shift two from 3:30 pm until midnight. Furthermore, the fact that the injury occurred on Monday, July 17, 2006 is consistent with the fact that appellant took leave for the rest of the week. A note on a medical clinic form for the employing establishment indicates that appellant was treated by them on July 19, 2006. He indicated that on Tuesday morning (July 18, 2006), he awoke "hurting everywhere." Appellant told the clinic attendant at that time that he was washing out tubs on Monday, July 17, 2006 when he felt pain in his back and right foot. In his statement received by the Office on September 14, 2006, he indicated that he received his injury on July 17, 2006. When the evidence is taken together, it becomes clear that the initial date on the claim form, July 18, 2006, was a simple mistake. The fact that appellant worked on July 17, 2006 in conjunction with his subsequent behavior of taking the day off on July 18, 2006 because he was in pain, the fact that he saw someone at the employing establishment's clinic on July 19, 2006 at which time he noted that he hurt himself on July 17, 2006 and the fact that he did not work the remainder of the week, make it clear that the incident occurred on July 17, 2006. Accordingly, although there is a minor discrepancy in the date of injury, it was sufficiently explained when one considers the totality of the circumstances. With regard to the mechanism of the injury, on his claim form, appellant merely indicated that he sustained his injuries when cleaning a restroom. In a more thorough statement received by the Office on September 14, 2006, he indicated that he was cleaning underneath the sink behind the toilet when he felt pain. Appellant's statement is consistent with the statement given to Ms. Decker, the human resources assistant, who indicated that appellant stated that his injuries occurred getting on the floor and attempting to reach behind and under toilets when cleaning. It is also consistent with the history given to Dr. Springer on September 14, 2006 when he indicated that he was underneath the sink doing some work when he noticed the pain. Although appellant's statement as set forth by the

clinic two days after the incident indicated that he was washing out tubs when he hurt himself and appellant's supervisor indicated that he told him he was cleaning the tubs and walls in the restroom when he felt pain, these discrepancies, as related by third parties, are relatively consistent in that he was reaching and cleaning in the restrooms when he felt the pain. An employee's statement regarding the occurrence of an employment incident is of great probative force and will stand unless refuted by strong or persuasive evidence.[11] Such strong and persuasive evidence is not present in this case. Accordingly, the Board finds that appellant established that the incident occurred as alleged.

As the Board finds that appellant established that the incident occurred as alleged, the hearing representative must consider the next element of establishing fact of injury, *i.e.*, she must consider the medical evidence and determine whether the employment incident caused a personal injury. After any further development deemed necessary, the Office shall issue a decision regarding whether appellant sustained an injury as a result of the July 17, 2006 employment incident, and if so, whether there were any periods of disability and whether he is entitled to medical benefits for treatment for the effects of any injury.

CONCLUSION

The Board finds that this case is not in posture for decision and must be remanded for further evidentiary development.

[11] *Gregory J. Reser*, 57 ECAB ___ (Docket No. 05-1674, issued December 15, 2005).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs' hearing representative dated June 13, 2007 is reversed regarding the finding that the employment incident did not occur on July 17, 2006, as alleged. The case is remanded for further consideration consistent with this opinion.[12]

Issued: April 17, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[12] In view of the Board's disposition of the case on the merits, the issue of whether the Office properly denied appellant's request for reconsideration is moot.