United States Department of Labor
Employees' Compensation Appeals Board

J.F., Appellant	)	
and	)	**Docket No. 10-865**
	)	**Issued: January 6, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Bellmawr, NJ, Employer	)	

Appearances:
Richard A. Daniels, 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 February 17, 2010 appellant filed a timely appeal from the Office of Workers' Compensation Programs' December 22, 2009 merit decision denying his traumatic injury claim. Pursuant to 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 sustained a traumatic injury while in the performance of duty on May 9, 2008.

FACTUAL HISTORY

On May 15, 2008 appellant, a 50-year-old mail handler, filed a traumatic injury claim alleging that at 7:25 a.m. on May 9, 2008, he was "pulling up the hook" and felt a pop in his left shoulder. He stopped work on the date of the claimed injury.

On May 27, 2008 the Office notified appellant that the evidence submitted was insufficient to establish his claim and advised him to provide, within 30 days, additional information and evidence, including a detailed description of how the claimed injury occurred, and statements from any witnesses or other documentation supporting his claim. It also requested a doctor's report containing a diagnosis and an opinion as to the cause of the diagnosed condition.

In a May 9, 2008 statement, supervisor Kim Phillips reported the results of an investigation of appellant's claimed injury, which she conducted jointly with supervisor Francis Stanton. Appellant stated that he was injured when he hooked a tow motor hook onto a tow motor "by the automation supervisor desk." When he bent down to replace the hook with a lighter hook, he felt a sharp pain in his right shoulder and neck. Ms. Phillips interviewed three coworkers whose "tows" began at 7:00 a.m. on the morning of the claimed incident. The only coworker who saw appellant was Karl Schiavo, who observed him talking with Mr. Stanton at 7:30 a.m. The investigation revealed that no one gave any hooks to appellant from 7:00 to 7:30 a.m. Appellant was given a (Form CA-1) claim and he left the building to go to a nearby hospital, where he was treated.

In a letter dated May 23, 2008, the employing establishment controverted appellant's claim. George Donahue, manager of distributions and operations, stated that appellant did not sustain an on-the-job injury on May 9, 2008. He contended that the incident could not have occurred at 7:25 a.m., as alleged, because he was in direct contact with appellant from 7:20 a.m. until 7:28 a.m. Appellant did not perform any physical work, operate any power equipment or sustain an injury during this time period. He reported to work at 7:09 a.m. At 7:20 a.m. Mr. Donahue approached appellant and explained to him what manual work he needed him to concentrate on, sorting letter trays in a breakdown unit. Appellant responded, "O.K, I will work on this...." At approximately 7:28 a.m., he walked away from his assigned work area, to the back part of the building, directly over to Mr. Stanton. At no time during their conversation, did appellant alert him of an injury. At 7:30 a.m., Mr. Donahue called Mr. Stanton, who informed him that appellant had just reported an injury. During an accident interview with acting Ms. Phillips, appellant stated he was injured minutes earlier when he "hooked a tow motor hook onto a tow motor…. I bent down to hook up a knocker to a tow motor." He further stated he felt a sharp pain in his right shoulder and neck. Mr. Donahue stated that appellant had not been instructed to operate any power equipment, such as a tow motor, when he reported for duty. The systems operations report for May 9, 2008 reveals that appellant was not on the power equipment prior to 7:30 a.m.

Ms. Phillips interviewed three fellow mail handlers who were assigned to appellant's work area. Goody Nieves, a coworker, stated he did not see the claimant on a tow motor or in the work area on the morning in question. Karl Shiavo, an employee, stated the first time he saw the claimant was when he saw him talking to Mr. Stanton at 7:30 a.m. Eugene Polanksy, a coworker, stated that he did not see appellant on the work floor at the time of the alleged accident. Linda Gormley, a supervisor, stated that from 7:00 to 7:30 a.m., she was present at her work area, which is about 40 feet away from the 0 to 9 pole, where the tow motor was parked. She did not see appellant, nor did he report an injury to her during the time in question. There was no hook equipment found on site.

Appellant submitted a May 9, 2008 emergency room report signed by Dr. Dean Debroekert, Board-certified in the field of family medicine, who diagnosed rotator cuff injury. Dr. Debroekert noted that appellant presented with left shoulder pain, which reportedly developed while he was lifting something at work.

Appellant submitted a May 21, 2008 report from Dr. David A. Bundins, a treating physician. He informed Dr. Bundins that he had a sudden onset of pain in the left trapezial area with radiation into the neck and into the left arm on May 9, 2008 while lifting a hook from a cart at work. On June 5, 2008 Dr. Bundens reviewed a report of a May 30, 2008 magnetic resonance imaging (MRI) scan, which demonstrated multiple level disc problems and a significant stenosis.

On June 12, 2008 James Yellen, a physical therapist, stated that appellant injured himself at work while lifting a hook from a cart. Appellant felt immediate pain in the left trapezius muscle.

In a June 12, 2008 statement, appellant provided details surrounding the claimed incident, which allegedly occurred while he was attempting to connect an empty knocker to a mule (cart), so that he could take it back to his work area. The knocker became stuck. As he tried to pull it apart, he felt a pop in his left shoulder and then a sharp pain in his neck.

In a decision dated July 3, 2008, the Office denied appellant's claim. It found that the evidence was insufficient to establish that the claimed event occurred at the time, place or in the manner alleged.

In a letter dated July 3, 2009, Mr. Donahue noted inconsistencies in appellant's June 12, 2008 letter. He stated that appellant was not assigned to work in the "automation area" on the day in question and that his regular bid assignment did not entail using a power tow motor, nor use of power tow motor hooks. Further, the employing establishment's investigation revealed that he was not operating a tow motor (a mule) on May 9, 2008. Appellant was uncooperative in a predisciplinary interview, refused to write a statement on how he injured himself and refused to go out on the workroom floor to demonstrate how the alleged injury occurred. During the interview, he contradicted himself, at times stating that he did not operate the power tow motor, while at other time indicating that he tried to start the power tow motor, and finally asserting that he actually operated and parked the power tow motor. Appellant was unable to report where he had placed the tow motor hooks following the alleged incident and the employing establishment was unable to locate any tow motor hooks on or near the tow motor. In a conversation which occurred between 7:20 and 7:28 a.m., he informed his supervisor that he would be working in the "Bull Pen." Appellant did not appear to be in pain at that time. Seconds after Mr. Donahue gave him his specific manual work assignment, appellant informed another supervisor that he had injured himself at 7:25 a.m.

In a June 30, 2008 report, Dr. Steven H. Ressler, a Board-certified internist, related a history of injury. Appellant reported that on May 9, 2008, he experienced severe pain in the left side of his neck, radiating to his shoulder, after hooking up a mail cart to a tractor. On July 21, 2008 Dr. Bundens noted that he initially saw appellant on May 21, 2008, after he injured himself on May 9, 2008, while he was "lifting a hook from a cart that had gone into the mule crooked."

Dr. Bundens stated that "per his history it happened with his activity at work; and, therefore, I would consider it work related."

On July 22, 2008 appellant requested an oral hearing.

In an August 14, 2008 report, Dr. Evan O'Brien, a Board-certified orthopedic surgeon, diagnosed left cervical radiculitis in the C5 distribution. He stated that appellant's symptoms began on May 5, 2008 due to a work-related injury. Appellant reported that he was attaching equipment needed for his job and felt a sudden onset of left-sided neck pain that radiated into his left shoulder and arm.

At the November 13, 2008 hearing, appellant testified that he had standing instructions to work for other mule drivers when necessary. He reported to work at 7:20 a.m. on the day in question. When appellant attempted to attach a knocker to a mule, "it went in crooked." When he tried to pull it out, he felt pain from his neck to his shoulder. Appellant never actually got a chance to "log on" to the mule, because he "never got that far." He further testified that as he was walking toward his immediate supervisor, Mr. Donahue "yelled something to him," but he did not respond. Appellant stated that he "did not have no conversation with him. I did not talk to him."

The record contains a July 10, 2008 notice of removal for improper conduct. The notice averred that appellant had falsely claimed that he injured himself on May 9, 2008 while hooking a knocker to a tow motor.

On December 11, 2008 Mr. Donahue responded to the hearing transcript. He reiterated the fact that appellant's bid job does not require the use of a mule. Mr. Donahue further stated that on the date in question, appellant was not needed to operate a tow motor, as there were already three tow motor operators authorized to work in the area. He knew that appellant was not working at 7:25 a.m. when the injury allegedly occurred because he was talking with appellant at that time.

In an undated statement, appellant noted that he had not yet signed onto the mule on May 9, 2008 because he had not yet hooked up. He disputed that he was not authorized to use the mule and stated that no one was with him at the time of the incident.

By decision dated February 5, 2009, the Office hearing representative affirmed the July 3, 2008 decision on the grounds that the evidence was insufficient to establish that the incident occurred in the time, place and in the manner alleged.

On October 9, 2009 appellant requested reconsideration.[1] He contended that the employing establishment failed to conduct a reasonable interview and that Mr. Donahue attempted to thwart his claim. As such, his allegations should be considered to be true.

[1] On August 10, 2009 appellant appealed the February 5, 2009 decision to the Board. By order dated November 23, 2009, the Board dismissed the appeal on appellant's request. Docket No. 09-1983 (issued November 23, 2009).

The record contains an October 9, 2009 arbitration decision sustaining a grievance filed by appellant against the employing establishment. The arbitrator found that the employing establishment failed to establish that it had issued appellant a notice of removal, as the concurring official (Mr. Donahue) openly and notoriously contravened his claim with the Office and used the "Day in Court" proceeding to build a case for management. Without making a determination on the merits of the case, the arbitrator sustained the grievance, directed the employing establishment to expunge the record and reinstate appellant to his former position with full back pay and all other benefits and entitlements.

In a letter dated October 30, 2009, Mr. Donahue contended that the October 9, 2009 arbitration award was not sufficient to establish appellant's claim. He noted that the arbitration decision addressed only the process whereby appellant was issued a notice of removal, without making a determination on the merits of the case before the Office, namely whether appellant suffered the work injury as claimed.

By decision dated December 22, 2009, the Office denied modification of the February 5, 2009 decision, finding that the evidence was insufficient to establish that the incident occurred as alleged in May 9, 2008.

LEGAL PRECEDENT

The Federal Employees' Compensation Act[2] provides for payment of compensation for disability or death of an employee resulting from personal injury sustained while in the performance of duty.[3] The phrase "sustained while in the performance of duty" is regarded as the equivalent of the coverage formula commonly found in workers' compensation laws, namely, "arising out of and in the course of employment."[4]

An employee seeking benefits under the Act 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 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 or specific condition for which compensation is claimed is causally related to the employment injury.[5] When an employee claims that he sustained a traumatic injury in the performance of duty, he must establish the "fact of injury," namely, he must submit sufficient evidence to establish that he experienced a specific event, incident or

[2] 5 U.S.C. §§ 8101 *et seq.*

[3] *Id.* at § 8102(a).

[4] This construction makes the statute effective in those situations generally recognized as properly within the scope of workers' compensation law. *Charles E. McAndrews*, 55 ECAB 711 (2004); *see also Bernard D. Blum*, 1 ECAB 1 (1947).

[5] *Robert Broome*, 55 ECAB 339 (2004); *see also Elaine Pendleton*, 40 ECAB 1143 (1989).

exposure occurring at the time, place and in the manner alleged, and that such event, incident or exposure caused an injury.[6]

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 subsequent course of action. In determining whether a *prima facie* 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 substantial doubt on a claimant's statements. The employee has not met his burden when there are such inconsistencies in the evidence as to cast serious doubt on the validity of the claim.[7]

The claimant has the burden of establishing by the weight of reliable, probative and substantial evidence that the condition for which compensation is sought is causally related to a specific employment incident or to specific conditions of employment.[8] An award of compensation may not be based on appellant's belief of causal relationship. Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish a causal relationship.[9]

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on whether there is a causal relationship between the claimant's diagnosed condition and the established incident or factor of employment. The opinion must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the established incident or factor of employment.[10]

ANALYSIS

The Board finds that appellant failed to meet his burden of proof to establish that he sustained a traumatic injury to his left shoulder on May 9, 2008. Appellant's presentation of the facts is not supported by the evidence of record, and does not establish his allegation that a specific event occurred which caused an injury on the date in question.[11] Moreover, there are inconsistencies in the evidence which cast serious doubt on the validity of his claim.

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[6] *See Paul Foster*, 56 ECAB 208 (2004). *Betty J. Smith*, 54 ECAB 174 (2002); *see also Tracey P. Spillane*, 54 ECAB 608 (2003). The term "injury" as defined by the Act, refers to a disease proximately caused by the employment. 5 U.S.C. § 8101 (5). *See* 20 C.F.R. § 10.5(q), (ee).

[7] *See Betty J. Smith, supra* note 6.

[8] *Katherine J. Friday*, 47 ECAB 591, 594 (1996).

[9] *Dennis M. Mascarenas*, 49 ECAB 215, 218 (1997).

[10] *John W. Montoya*, 54 ECAB 306 (2003).

[11] *See Dennis M. Mascarenas, supra* note 9.

Appellant initially reported on his CA-1 form that at 7:25 a.m. on May 9, 2008, he was "pulling up the hook" and felt a pop in his left shoulder. He provided no detailed account of the incident, as required in a traumatic injury claim. On June 12, 2008 appellant stated that he was attempting to connect an empty knocker to a mule when the knocker became stuck. As he tried to pull it apart, he felt a pop in his left shoulder and then a sharp pain in his neck. However, appellant's allegations are vague and do not relate with specificity the circumstances or the exact and immediate consequences, of the injury (*e.g.*, whether he dropped the hook, fell to the ground or cried out).

Appellant testified that he injured his shoulder at 7:25 a.m. on the date in question, noting that he had standing instructions to work for other mule drivers when necessary. He denied having any conversation with Mr. Donahue, stating that as he was walking toward his immediate supervisor, Mr. Donahue "yelled something to him," but he did not respond. The employing establishment, however, denied his allegations and controverted the claim. Mr. Donahue stated that the incident could not have occurred at 7:25 a.m., as alleged, because he was within direct contact with appellant from 7:20 a.m. until 7:28 a.m. and that appellant did not perform any physical work, operate any power equipment or sustain an injury during this time period. He gave appellant work instructions, which included sorting letter trays in a breakdown unit. Appellant responded, "O.K, I will work on this...." At approximately 7:28 a.m., appellant walked away from his assigned work area, to the back part of the building, directly over to Mr. Stanton. At no time during their conversation, did appellant alert him of an injury. At 7:30 a.m., Mr. Donahue called Mr. Stanton, who informed him that appellant had just reported an injury. He stated that appellant had not been instructed to operate any power equipment, such as a tow motor, when he reported for duty.

Appellant provided no statements to corroborate his claim from anyone who either witnessed the alleged incident or to whom he immediately described the effects of his injury.[12] On the other hand, statements from several fellow mail handlers who were assigned to appellant's work area on May 9, 2008 do not support his claim. Mr. Nieves stated he did not see the claimant on a tow motor or in the work area on the morning in question. Mr. Shiavo stated the first time he saw the claimant was when he saw him talking to Mr. Stanton at 7:30 a.m. Mr. Polanksy stated that he did not see appellant on the work floor at the time of the alleged accident. Ms. Gormley stated that from 7:00 to 7:30 a.m., she was present at her work area, which was about 40 feet away from the 0-9 pole, where the tow motor was parked. She did not see appellant, nor did he report an injury to her during the time in question.

On appeal, appellant's representative contends that the employing establishment was unable to present clear and convincing evidence that appellant was injured in a manner other than that alleged. He notes that 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.[13] The burden, however, is not on the employing establishment,

[12] The Board notes that in an undated statement, appellant disputed that he was not authorized to use the mule and stated that no one was with him at the time of the incident. The record, however, does not contain a statement from any witness corroborating his claim.

[13] *Caroline Thomas*, 51 ECAB 451 (2000).

but rather is on appellant, to establish that he was injured in the performance of duty. In the instant case, the inconsistencies in the evidence cast serious doubt on the validity of appellant's claim. The employing establishment controverted the claim and provided concrete evidence, in the form of witness statements and systems operations reports, supporting its position that the incident did not occur as alleged on May 9, 2008.

Counsel contends that the October 9, 2009 decision of the arbitrator requires a finding in appellant's favor. The Board disagrees. The Board has held that grievances and EEO complaints, by themselves, do not establish that workplace harassment or unfair treatment occurred.[14] The Office or other appropriate fact-finder must determine the truth of a claimant's allegations. In this case, the arbitrator sustained appellant's grievance against the employing establishment, finding that it failed to establish that it had just cause to issue him a notice of removal. He found that the concurring official (Mr. Donahue) openly and notoriously contravened appellant's claim with the Office and used the "day in court" proceeding to build a case for management. The arbitrator, however, did not make a determination on the merits of appellant's traumatic injury claim. The issue before the Board is not whether appellant was improperly terminated by his employer. Rather, the relevant issue is whether he has submitted sufficient evidence to establish a factual basis for his claim by supporting his allegations with probative and reliable evidence.[15] For reasons previously stated, the Board finds that appellant has not met his burden of proof.

Thus, appellant failed to establish the fact of injury: he did not submit sufficient evidence to establish that he actually experienced an employment incident at the time, place and in the manner alleged or that the alleged incident caused the claimed left shoulder condition. Therefore, the Board finds that he has not met his burden of proof to establish that he sustained an injury in the performance of duty on May 9, 2008.[16]

CONCLUSION

Appellant has not met his burden of proof to establish that he sustained a traumatic injury to her right knee in the performance of duty on May 9, 2008.

[14] *John W. Montoya*, *supra* note 10.

[15] *See Dennis M. Mascarenas*, *supra* note 11. *See also Michael Ewanichak*, 48 ECAB 354 (1997).

[16] As appellant failed to establish that the claimed event occurred as alleged, it is not necessary to discuss the probative value of medical evidence. *Id*.

ORDER

IT IS HEREBY ORDERED THAT the December 22, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 6, 2011
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