

injury was nonwork related. When appellant reported to work on August 4, 2003, he told the employing establishment that he hurt his back and could not carry mail. Mr. Nugent then informed appellant that he could not permit him to work because if he aggravated his injury while on the clock, it would then become work related. He stated that at this time appellant began alleging that the injury was work related. Mr. Nugent also stated that appellant provided inconsistent statements regarding the manner in which his injury occurred. He asserted that appellant wrote in a statement that he was injured while lifting a “tray of flats,” while stating on his Form CA-1 that he was injured while lifting a “tub into his hamper,” which is an entirely different piece of equipment.

Appellant submitted treatment notes dated August 5, 2003 from Dr. Richard Skaroff, a specialist in internal medicine, which indicated he was being treated for lumbar strain and disc disease and that he was unable to work from August 5 to 12, 2003. Appellant also submitted an August 12, 2003 radiology report which indicated he had injured his back while lifting and an August 4, 2003 report from Dr. Wayne Hentshel, an osteopath, which indicated he had been injured on July 31, 2003.

By letter dated September 10, 2003, the Office advised appellant that he needed to submit additional factual and medical evidence in support of his claim. The Office stated that appellant had 30 days to submit the requested information. Appellant did not respond to this request within 30 days.

By decision dated October 16, 2003, the Office denied appellant’s claim. The Office stated that it had requested additional factual and medical evidence by letter dated September 10, 2003, but that appellant had failed to respond to this request.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees’ Compensation Act¹ 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 an occupational disease.³

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first 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 Second, the employee must

¹ 5 U.S.C. § 8101 *et seq.*

² *Joe D. Cameron*, 42 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).

submit sufficient evidence, generally only in the form of medical evidence, to establish that the employment incident caused a personal injury.⁵

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,⁶ 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 her subsequent course of action.⁷ 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.⁸

ANALYSIS

In this case, appellant has not established fact of injury because of inconsistencies in the evidence that cast serious doubt as to whether the specific event or incident occurred at the time, place and in the manner alleged. Although appellant alleged on his CA-1 form that he injured his lower back on July 31, 2003 while “picking up tub/flats into hamper,” this statement was subsequently contradicted by his August 4, 2003 statement in which he stated that he was injured while lifting a tray of flats, which is an entirely different type of equipment. In addition, although appellant initially called in sick and informed the employing establishment on consecutive days that his injury was not work related, he subsequently returned to work on August 4, 2003 and told Mr. Nugent that his injury was work related. Further, according to Mr. Nugent, appellant did not allege that his injury was work related until after he told him that he would not allow him to work because aggravating his injury would cause it to become work related.⁹ These statements are inconsistent with appellant’s assertion, on his CA-1 form, that he injured his lower back on July 31, 2003 while lifting a “tray of flats.” This contradictory evidence created an uncertainty as to the time, place and in the manner in which appellant sustained his alleged lower back injury.

In addition, appellant failed to submit to the Office a corroborating witness statement in response to the Office’s request. This casts additional doubt on appellant’s assertion that he strained his lower back while lifting mail on July 31, 2003. The Office requested that appellant

⁵ *Id.* For a definition of the term “injury,” see 20 C.F.R. § 10.5(e)(e).

⁶ *Pendleton*, *supra* note 2.

⁷ *See Gene A. McCracken*, Docket No. 93-2227 (issued March 9, 1995); *Joseph H. Surgener*, 42 ECAB 541, 547 (1991).

⁸ *See Constance G. Patterson*, 42 ECAB 206 (1989).

⁹ The evidence submitted by an employing establishment on the basis of their records will prevail over the assertions from the claimant unless such assertions are supported by documentary evidence. *See generally Sue A. Sedgwick*, 45 ECAB 211, 218 n.4 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computation of Compensation*, Chapter 2.900(b)(3) (September 1990).

submit additional factual and medical evidence explaining how he injured his lower back on the date in question, and requested additional medical evidence in support of his claim that his lower back pain was related to the alleged work incident of July 31, 2003. Appellant failed to submit such evidence.¹⁰ Therefore, given the inconsistencies in the evidence regarding how appellant sustained his injury, the Board finds that there is insufficient evidence to establish that appellant sustained an injury in the performance of duty as alleged.¹¹

CONCLUSION

The Board finds that the Office of Workers' Compensation Programs properly found that appellant failed to meet his burden of proof to establish that he sustained a lower back injury in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the October 17, 2003 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: September 27, 2004
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

¹⁰ On appeal, appellant has submitted new evidence. However, the Board cannot consider evidence that was not before the Office at the time of the final decision. *See Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35 (1952); 20 C.F.R. § 501(c)(1). Appellant may resubmit this evidence and legal contentions to the Office accompanied by a request for reconsideration pursuant to 5 U.S.C. § 8128(a). 20 C.F.R. § 501(c).

¹¹ *See Mary Joan Coppolino*, 43 ECAB 988 (1992) (where the Board found that discrepancies and inconsistencies in appellant's statements describing the injury created serious doubts that the injury was sustained in the performance of duty).