United States Department of Labor
Employees' Compensation Appeals Board

MAUREEN A. DUCKWORTH, Appellant	)	
and	)	**Docket No. 05-828**
	)	**Issued: July 18, 2005**
DEPARTMENT OF HEALTH & HUMAN SERVICES, FOOD & DRUG ADMINISTRATION, Harrisburg, PA, Employer	)	

Appearances:
Maureen A. Duckworth, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 28, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' December 28, 2004 merit decision denying her claim that she sustained an employment-related injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met her burden of proof to establish that she sustained an injury in the performance of duty on February 19, 2003.

FACTUAL HISTORY

On May 28, 2003 appellant, then a 34-year-old investigator, filed a traumatic injury claim alleging that on February 19, 2003 she sustained an employment-related asthma attack. Regarding the cause of the alleged injury, appellant stated that "Supervisor's office had a plug-in

air freshener in her office. Had meeting in office and attack occurred."[1] Appellant stopped work on February 19, 2003 and returned to work on February 24, 2003.

Appellant submitted a February 20, 2003 note in which Dr. Gordon R. Eck, an attending osteopath, indicated that she had been under his care since February 19, 2003 and could return to work on February 24, 2003. Dr. Eck provided a diagnosis of "active asthma."

By letter dated November 16, 2004, the Office requested that appellant submit additional factual and medical evidence in support of her claim within 30 days.

By decision dated December 28, 2004, the Office denied appellant's claim that she sustained an employment-related injury on February 19, 2003. The Office determined that the evidence submitted by appellant was insufficient to establish that the events claimed to have caused injury actually occurred as alleged.

LEGAL PRECEDENT

An employee who claims benefits under the Federal Employee's Compensation Act[2] has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.[3] 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.[4] An employee has not met her burden of proof of 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.[5] 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 sufficient doubt on an employee's statements in determining whether a *prima facie* case has been established.[6] However, 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.[7]

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[1] The claim form contained a statement in which a coworker indicated that on February 19, 2003 appellant was coughing and gasping for breath and appeared weak and nearly incapacitated. Appellant's supervisor indicated that appellant might have been in her office on that date to discuss work but that she was not in her office when the attack occurred.

[2] 5 U.S.C. §§ 8101-8193.

[3] *William Sircovitch*, 38 ECAB 756, 761 (1987); *John G. Schaberg*, 30 ECAB 389, 393 (1979).

[4] *Charles B. Ward*, 38 ECAB 667, 670-71 (1987); *Joseph Albert Fournier, Jr.*, 35 ECAB 1175, 1179 (1984).

[5] *Tia L. Love*, 40 ECAB 586, 590 (1989); *Merton J. Sills*, 39 ECAB 572, 575 (1988).

[6] *Samuel J. Chiarella*, 38 ECAB 363, 366 (1987); *Henry W.B. Stanford*, 36 ECAB 160, 165 (1984).

[7] *Robert A. Gregory*, 40 ECAB 478, 483 (1989); *Thelma S. Buffington*, 34 ECAB 104, 109 (1982).

If a claimant establishes that she actually experienced the employment incident at the time, place and in the manner alleged, she must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.[8] The term injury as defined by the Act, refers to some physical or mental condition caused by either trauma or by continued or repeated exposure to, or contact with, certain factors, elements or conditions.[9]

ANALYSIS

Appellant alleged that on February 19, 2003 she sustained an employment-related asthma attack; she asserted that the attack occurred after she was exposed to a plug-in air freshener in her supervisor's office. The Office denied appellant's claim on the grounds that she did not establish the occurrence of the employment incident as alleged.

The Board finds that appellant established the occurrence of an employment incident on February 19, 2003 when she was exposed to a plug-in air freshener in her supervisor's office. Appellant consistently alleged that she sustained an asthma attack after being exposed to an air freshener while she was discussing work with her supervisor in her office. The record contains statements of a coworker and supervisor regarding the events of February 19, 2003, which are consistent with appellant's account. The record also contains documentation, which shows that appellant stopped work on February 19, 2003, *i.e.*, the day of her alleged asthma attack and sought medical treatment on that date. There are not such inconsistencies in the evidence as to cast serious doubt upon the validity of appellant's claim. Appellant's claim that she sustained an asthma attack after being exposed to an air freshener in her supervisor's office on February 19, 2003 has not been refuted by strong or persuasive evidence.[10]

Although appellant has established the occurrence of an employment incident on February 19, 2003 when she was exposed to a plug-in air freshener in her supervisor's office, she did not submit sufficient medical evidence to establish that she sustained an injury due to this incident. She submitted a February 20, 2003 note in which Dr. Eck, an attending osteopath, diagnosed asthma and indicated that she had been under his care since February 19, 2003 and could return to work on February 24, 2003. This report, however, is of limited probative value on the relevant issue of the present case in that it does not contain an opinion on causal relationship.[11]

[8] *John J. Carlone*, 41 ECAB 354, 356-57 (1989); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2a (June 1995).

[9] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989); 20 C.F.R. § 10.5(a)(14).

[10] *See supra* notes 4 through 7 and accompanying text.

[11] *See Charles H. Tomaszewski*, 39 ECAB 461, 467-68 (1988) (finding that medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

Dr. Eck did not provide any indication that appellant sustained an asthma attack due to the accepted employment incident.[12]

CONCLUSION

The Board finds that, although appellant established the occurrence of an employment incident on February 19, 2003, she did not submit sufficient medical evidence to meet her burden of proof to establish that she sustained an injury in the performance of duty on that date.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' December 28, 2004 decision is affirmed as modified to reflect that appellant established the occurrence of an employment incident on February 19, 2003 but did not submit medical evidence to show that she sustained an injury due to the incident.

Issued: July 18, 2005
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

[12] Appellant submitted additional evidence after the Office's December 28, 2004 decision, but the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c). On January 19, 2005 appellant requested a review of the written record by an Office hearing representative but the record does not contain any final decision of a hearing representative.