United States Department of Labor
Employees' Compensation Appeals Board

M.G. Appellant	)	
	)	
and	)	**Docket No. 07-1475**
	)	**Issued: October 19, 2007**
SOCIAL SECURITY ADMINISTRATION,	)	
Auburn, WA, Employer	)	
	)	

Appearances:
Appellant, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 1, 2007 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated February 1, 2007. Under 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 has established that he sustained an injury on January 26, 2006 in the performance of his federal employment at the time, place and in the manner alleged.

FACTUAL HISTORY

Appellant, a 30-year-old teleservice representative, filed a Form CA-2a, claim for recurrence of disability on March 29, 2006 alleging that he experienced neck and back pain on January 24, 2006 causally related to an injury he sustained on May 16, 2001. In a May 7, 2006 statement, appellant asserted:

> "On January 24, 2006 I was working for [the employing establishment] on my scheduled eight hour shift and was sitting at my work station performing my

regular duties.... When answering a call I turned to get up and retrieve paper work and noticed a pop in my back upper/lower back. Immediately following I noticed a pain in my both lower/upper back. My back started to get really stiff and tight. After returning to my seat I completed my call. During my next call I leaned forward to retrieve a form from my file cabinet and my neck popped. Immediately afterward I suffered a sharp neck pain and stiffness. I started to have a headache and was getting dizzy with some blurred vision."

In a letter dated May 24, 2006, the Office advised appellant that, based on his description of the January 24, 2006 work incident, it would adjudicate his claim as one for traumatic injury.[1]

In a May 24, 2006 report, Dr. Kevin P. Connelly, a Board-certified neurologist, stated:

"[Appellant] had been referred neurologically for evaluation of chronic pain and discomfort over his head and over his neck. The initial neurologic diagnosis was that of a chronic cervical minor factual pain syndrome, without evidence or radiculopathy or myelopathy. I recommended that [appellant] continue with chiropractic care and massage therapy.

"[Appellant] then returned with more intense headache and fever. Appellant was evaluated in the emergency room in the diagnosis of acute sinusitis was made. A lumbar puncture was negative. [Appellant] subsequently developed headache, when he stood up. He was referred for an epidural patch. The epidural patch was successful.

"The MRI [magnetic resonance imaging] scan of the cervical spine revealed only minimal degenerative changes. There was no evidence for disc herniation.

"At the time of his last visit, [appellant] still felt somewhat lightheaded.

"[Appellant] continues with pain and discomfort over his neck. He has been receiving chiropractic care and physical therapy. These interventions have been helpful."

Dr. Connelly diagnosed chronic cervical myofascial pain syndrome without neurologic involvement, myelopathy, radiculopathy or entrapment neuropathy. He also diagnosed acute sinusitis; postlumbar puncture headache, status post epidural patch and moderately severe asthma.

[1] The Office noted that appellant had previously filed a claim for traumatic injury on January 9, 2004 which was accepted for subluxations of the cervical, thoracic and lumbar spines.

Appellant submitted a January 24, 2006 report from the employing establishment's medical clinic, received by the Office on June14, 2006, which indicated:

> "[Appellant] not lightheaded or dizzy while laying down and states his headache is better, but the dizziness returns when he sits up."

The report also contained a notation from appellant in which he stated:

> "I have a headache. It is throbbing, it has not gone away since Sunday…. It has gotten progressively worse. It is in the temple area. I have been dizzy and faint in times past, was checked out by a [primary care physician] and they never found anything. I also have chest tightness, my lungs feel tight. Some body aches. The pain started (in the right occipital region) it was really sharp pain and I feel like I have been forgetful of things more recently."

The report also noted that appellant had upper respiratory congestion or discomfort, that he was going to lay down with a cold pack to his occipital region for 20 minutes and that his supervisor was present to check on him.

In a report dated July 5, 2006, Dr. James L. Gould, a chiropractor, stated:

> "Due to a lack of diagnostic medical findings involving [appellant's] dizziness and his increase of objective spinal findings on his March 28, 2006 examination done in my office I have requested a reopening of [appellant's] workers' compensation claim. His preprioceptive receptors can cause dizziness from a cervical injury and can continue to be a problem if his work station is not appropriate for his spinal condition.
>
> "I understand [that] [appellant] has missed work due to his symptoms and car pooling arrangements. [Appellant] will be having sinus surgery to be done by [an ear, nose and throat] specialist on August 2, 2006; however, [the physician] told [appellant] he does not expect the surgery to help his dizziness problem."

On July 27, 2006 appellant filed a Form CA-1, claim for benefits based on traumatic injury. In the attachment to the form, he reiterated the description of injury he provided on his Form CA-2a [see above]. Appellant's supervisor submitted a statement, received by the Office on August 10, 2006, in which he stated:

> "On January 24, 2006 I was not informed by [appellant], nor did I have any knowledge that he was alleging this was a work-related injury. This report was not made known to me until March 29, 2006 after [appellant] returned to work and submitted Form CA-2a. However, on January 24, 2006 [appellant] was seen in [the employment establishment's medical clinic] by [Nurse] Colleen Durand. [H]e stated [that] his symptoms were headache and upset stomach. After returning from the health unit, he advised me that he probably had the flu and requested sick leave for the remainder of the day.

"I was not made aware of the allegation that he suffered a job related injury until March 29, 2006. Per medical evidence submitted by [appellant], he was being treated during his absence from January 24 to March 15, 2006 for headache, dizziness and upset stomach. The medical documentation provided during the above time period listed headache, dizziness and sinus pain with no mention of neck and/or back pain. When [appellant] called to request leave during the above timeframe, whether he spoke to me or another supervisor, he stated [that] he was unable to work and it was due to headache, upset stomach and/or dizziness with no mention of neck and/or back pain.

"The medical documentation [appellant] provided released him to return to work on March 15, 2006 with the following restrictions: allow position changes as needed to maintain comfort, interrupt long term sitting when dizziness comes on; *i.e.*, stand and walk for a few minutes then return to work. [Appellant] did not return to work until March 21, 2006 because of a trip to Texas."

By decision dated October 10, 2006, the Office denied the claim. It accepted that the January 24, 2006 incident occurred, but found that appellant failed to submit sufficient medical evidence to establish that the claimed medical condition resulted from the accepted event.

By letter dated November 3, 2006, appellant requested reconsideration. He submitted a September 21, 2006 report from Dr. Daniel Katz, an osteopath, who related appellant's account of having injured his back and neck in May 2001, January 2004 and January 24, 2006. Dr. Katz stated findings on examination and diagnosed neck, upper back and mid back pain resulting from previous injuries. In a September 28, 2006 report, Dr. Katz stated that appellant was being treated for a follow-up examination stemming from his January 24, 2006 injury. He noted full range of motion in the lumbar spine and normal strength in the upper extremities. Dr. Katz diagnosed cervical myofascial pain with midthoracic and lumbar pain relating to his January 24, 2006 work injury.

In a report dated October 30, 2006, Dr. Katz essentially reiterated his previous findings and conclusions and stated that appellant's condition remained unchanged.

In a January 23, 2007 statement, appellant's supervisor stated:

"On January 24, 2006 [appellant] requested permission to visit [the employing establishment] to see the attending nurse, Durand. [He] submitted the nurse's report, which indicated that he reported experiencing a headache that had started at home the previous Sunday, as well as an upset stomach. After seeing the nurse, [appellant] returned to the work area and advised me that he probably had the flu and requested sick leave for the remainder of the day due to headache and congestion. At no point during this conversation did [appellant] reference any back or neck injury. [He] left work that afternoon; he did not return for two months, on March 21, 2006.

"Specifically, from January 25 to March 15, 2006 [appellant] telephoned to request sick leave. During each telephone contact with either [myself] or the back-up

supervisor, [he] indicated that he was ill due to a headache, dizziness and/or sinus pain. There was never any mention of neck or back pain as the cause for his absences.

"We requested that [appellant] provide medical documentation to support his continued and frequent absences from January through March 2006. Subsequently, [he] provided evaluations from his physician, a neurologist and an ear, nose and throat specialist. These medical records documented that [appellant] was diagnosed with a sinusitis medical condition. During this period of absence, however, [he] never referenced that he had suffered an on-the-job injury."

By decision dated February 1, 2007, the Office denied appellant's claim but modified its October 10, 2006 decision by finding that he failed to establish fact of injury. It noted that the medical reports contemporaneous with the alleged January 24, 2006 incident did not indicate that he sustained a back or neck injury on that date. The Office further noted that appellant's supervisor indicated that appellant informed her that he was experiencing headaches and dizziness and never mentioned neck or back pain as the cause of his absences from January 26 to March 15, 2006.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[2] 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.[3] 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.[4]

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.[5] 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.[6]

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[2] 5 U.S.C. § 8101 *et seq*.

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

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

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

[6] *Id.* For a definition of the term "injury," see 20 C.F.R. § 10.5(e).

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,[7] 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.[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 cast doubt on an employee's statements in determining whether he or she has established his or her claim.[9]

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. He alleged in his CA-1 form and in his May 7, 2006 statement that he injured his neck and back on January 24, 2006. Appellant stated that he felt a pop in his upper and lower back while answering a telephone call and while turning to get up and retrieve paperwork and that subsequently his back became stiff and tight. These statements, however, were contradicted by the statements appellant made to Nurse Durand at the employing establishment's medical clinic on January 24, 2006, *i.e.*, that he had been experiencing a throbbing headache since the previous Sunday which had gotten progressively worse, in addition to dizziness, faintness and tightness in his chest and lungs. Appellant also told Nurse Durand that the pain started in the right occipital region. Nurse Durand indicated in the January 24, 2006 treatment notes that appellant stated that he was experiencing upper respiratory congestion or discomfort. She related that appellant told her that he had headache and upset stomach symptoms, that he probably had the flu and had requested sick leave for the remainder of the day because he was experiencing these symptoms.

Appellant can be reasonably imputed to have knowledge of when he sustained an injury that caused him to be medically released from work.[10] However, in her August 10, 2006 and January 23, 2007 statements, appellant's supervisor indicated that she was not informed of his allegation that he suffered a job-related injury until March 29, 2006. She related that all of the medical evidence appellant submitted during his absence from work from January 24 to March 15, 2006 indicated that he was being treated for headache, dizziness, sinus pain and upset

[7] *Pendleton*, *supra* note 3.

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

[9] *See Constance G. Patterson*, 42 ECAB 206 (1989).

[10] 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).

stomach, with no mention of neck and/or back pain. Appellant indicated that he was experiencing these same symptoms without referencing any back or neck pain, when he called to request leave during this period. In addition, he did not submit any medical evidence attributing his back and neck pain to an alleged January 24, 2006 work incident until Dr. Katz's September and October 2006 reports. This contradictory evidence created an uncertainty as to the time, place and the manner in which appellant sustained his alleged back and neck injuries.

The Board further notes that appellant failed to submit to the Office a corroborating witness statement. This casts additional doubt on appellant's assertion that he strained his back and neck while answering a telephone call and retrieving paperwork on January 24, 2006. Therefore, given the inconsistencies in the evidence regarding how appellant sustained his injury, the Board finds that there is insufficient evidence to establish that he sustained an injury in the performance of duty as alleged.[11] Accordingly, the Board affirms the February 1, 2007 Office decision.

CONCLUSION

The Board finds that the Office properly found that appellant failed to meet his burden of proof to establish that he sustained back and neck injuries in the performance of duty on January 24, 2006.[12]

[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).

[12] On appeal, appellant has submitted new evidence. However, the Board cannot consider new 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. § 501.2(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. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the February 1, 2007 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: October 19, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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