United States Department of Labor
Employees' Compensation Appeals Board

R.H., Appellant	)	
and	)	**Docket No. 07-1647**
	)	**Issued: August 15, 2008**
DEPARTMENT OF THE AIRFORCE, IDAHO AIR NATIONAL GUARD, Boise, ID, Employer	)	

Appearances:
Wendy L. Hatten, for the appellant
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 June 4, 2007 appellant filed a timely appeal from the May 23, 2007 decision of the Office of Workers' Compensation Programs denying his claim for compensation on the grounds that fact of injury was not established. 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 established that he sustained an injury in the performance of duty on December 19, 2001, as alleged.

FACTUAL HISTORY

On December 20, 2001 appellant, then a 42-year-old aircraft mechanic, filed a traumatic injury claim alleging that on December 19, 2001 he pulled muscles in his lower back while in the performance of duty. Specifically, he noted that he was walking down steps with an air conditioning panel in his hands and "stepped on a 2 cell mag lite that rolled under my weight." In a letter dated April 8, 2003, the Office informed appellant that his case was originally received

as a simple, uncontroverted case which resulted in minimal time loss and that these cases were administratively handled to allow medical payments of up to $1,500.00 but that the merits of the case had never been addressed. It informed appellant that it was now necessary for him to submit further information to support his claim.[1]

Appellant responded to the Office's request in a letter dated April 29, 2003 wherein he noted that his job as aircraft mechanic crew chief required him to service, maintain and repair a C-130 Herculus aircraft of the Idaho Air National Guard. He noted that this position required a varied degree of physical exertion. Appellant reiterated that, on December 19, 2001, while carrying a large panel down stairs, he stepped on a 2 cell mag lite (flashlight) which caused him to lose his balance and wrench his back as he tried to catch himself and not drop that panel. He noted that his low back immediately hurt and that he immediately reported the incident to his supervisor. Appellant noted that at the time of the December 19, 2001 incident he was already on light duty for an August 1, 2001 injury and was on pain medication and muscle relaxers for that event. He further stated that, as there was already a controversy about the medical status of the prior incident and whether these bills would be paid, he did not go to his physician right away. Appellant stated, "The thought was that I had pulled a muscle and I already had medication for that type of injury." He noted that at the end of January 2002 his low back pain had not subsided so he opted to go to his family physician. Appellant noted that, over the course of the next several months, there were many visits to his family physician and other specialists with regard to his mid-back pain resulting from both the August 1 and December 19, 2001 incidents. He noted that it was not until the November/December 2002 time frame that his low back pain became so great that it was decided that a magnetic resonance imaging (MRI) scan should be performed and it was at that time that the herniated discs were discovered.

In a medical report dated July 29, 2002, Dr. Brenda J. Adams, a Board-certified family practitioner, noted that she initially saw appellant on June 6, 1990 after he had been ejected from an aircraft. She noted that she treated him for multiple injuries since that time. Dr. Adams noted that appellant outlined his injuries as including a December 19, 2001 injury when he stepped on a round flashlight on one of the steps and twisted his back. She indicated that she was unable to determine "what pain issues he has are related to what injuries he has had in the past. [Appellant] certainly has suffered a very extreme injury when he had the uncontrolled ejection from the aircraft 12 years ago and certainly has been complaining of musculoskeletal pain on a fairly regular, ongoing basis since that time." In November 27 and December 11, 2002 reports, Dr. Adams indicated that she treated appellant for chronic neck and back pain.

Appellant submitted medical reports by Dr. Joseph M. Verska, a Board-certified orthopedic surgeon. He first saw Dr. Verska on December 27, 2002 and he noted that Dr. Adams referred appellant to him. Under history, Dr. Verska noted that appellant's back pain started in 1990 when he was ejected from an RF-4C. Appellant also informed Dr. Verska of an injury on August 1, 2001 that occurred while moving equipment on a C-130. Dr. Verska noted

[1] The Board notes that the Office previously accepted appellant's claim for a May 17, 1990 cervical strain he suffered when he was ejected from an RF-4C aircraft. However, the Office denied appellant's claim for a recurrence of disability commencing December 30, 1996. On May 3, 2006 it denied appellant's request for reconsideration without merit review and this Board affirmed the Office's decision on March 19, 2007. Docket No. 06-1389.

at this time that appellant had a mild disc bulge at L5-S1 producing S1 radiculitis. He noted that it would be difficult to determine who was responsible for appellant's injuries, although he noted that the leg pain was recent with onset three or four weeks ago. In notes dated January 9 and 28, 2003, Dr. Verska indicated that appellant continued to complain of right buttock pain and right posterior thigh pain. Appellant noted that he underwent an S1 nerve block which did not give him too much relief of pain.

In a March 13, 2003 report, Dr. Ronald S. Higginbotham, an osteopath, indicated that he had been involved in appellant's musculoskeletal care since October 1998. He noted three significant injuries: a May 17, 1990 injury when ejected from an aircraft; an August 1, 2001 injury that occurred while moving heavy equipment; and a December 19, 2001 injury from twisting/tripping while stepping on a flashlight while doing aircraft maintenance. Dr. Higginbotham noted that appellant had chronic myofascitis as a result of the first injury and the second injury exacerbated the symptoms of the first injury. He stated that the third injury, however, was different in that the outcome was the development of a new finding -- right leg radicular symptoms. Dr. Higginbotham noted that a neurological consult and MRI scan demonstrated a herniated lumbar disc.

By decision dated May 23, 2003, the Office denied appellant's claim. It found that, although the evidence established that the event occurred as alleged, there was no medical evidence that provided a medical diagnosis connected with the accepted event.

On May 20, 2003 appellant requested reconsideration. In a May 29, 2003 memorandum, he indicated that he did not see a physician at the time of the injury because there was an ongoing debate at the time with regard to status of his claim. Appellant further noted, "When I queried about treatment, I was informed not to incur bills for medical treatment without authorization, as they would probably not be reimbursed." He noted that, in trying to keep medical bills to a minimum, he did not see a physician immediately after the December 19, 2001 employment incident. Appellant noted that he was on medication for the August 1, 2001 occurrence and it was not until January 24, 2002 that he went to a doctor about his low back strain.

On May 29, 2003 appellant sent a memorandum to various parties at the employing establishment seeking statements in support of his claim. In that memorandum, he noted that the Office had denied his claim regarding the alleged December 19, 2001 injury, which occurred when he stepped on a round flashlight which caused him to twist his back. Appellant also noted that he had a prior injury on August 1, 2001 while on training and that immediately following that event, a debate started concerning his status. He stated that the military medical personnel involved considered the injury a recurrence of his 1990 ejection injuries and not a military responsibility and the human resources officer considered it a new injury. During this debate, appellant indicated that the condition of his whole back came into question and he was told not to incur further medical bills without authorizations as they probably would not be reimbursed. Several officers responded. In a June 2, 2003 statement, CM Sergeant David E. Beckman stated that he fully concurred with appellant's position concerning his continuing problems of receiving medical treatment. He noted that the events and dates provided were accurate and the advice he received to not incur any unauthorized treatment or bills is correct, as legal and medical personnel at "Gwen Field" gave him this advice and he had no reason not to follow it. In a

July 13, 2003 memorandum, Major John A. Miller and also noted his support that appellant's claim should be reconsidered. He argued that the evidence clearly established that appellant was well enough to perform his duties prior to the alleged December 19, 2001 injury. In a July 13, 2003 memorandum, Colonel Daniel M. Skate indicated that he recommended acceptance of the claim for compensation, noting that the injury was documented on the CA-1, that the medical care related to a back injury and that there was no intervening history of another cause of back injury. Finally, in a July 15, 2003 memorandum, Brigadier General Gary L. Saylor indicated that he strongly concurred with appellant's request for additional review of the alleged December 19, 2001 job injury. He stated, "Bureaucratic confusion over the medical responsibility of previous injuries has interfered with the proper medical handling of this incident." Brigadier General Saylor noted that, following the 1990 aircraft ejection injury, appellant did not return to the physical condition he enjoyed prior to the accident, but he was able to perform job duties at a satisfactory level. However, he noted that, since the December 2001 incident, appellant has been "unable to perform satisfactorily and is facing a possible medical elimination."

By decision dated October 24, 2003, the Office denied modification of its decision.

By letter dated October 21, 2004 appellant, through his attorney, requested reconsideration.

In further support of his claim, appellant submitted medical reports by Dr. Michael V. Hajjar, a neurosurgeon, who first saw appellant on October 15, 2003. In history, Dr. Hajjar noted that appellant indicated that his low back pain began in the early 1990s and that he was reinjured in 2001 as a result of his work as an aircraft mechanic. In a December 11, 2003 report, he reviewed appellant's MRI scan and decided to defer any surgery at this time. Dr. Hajjar noted that, given appellant's level of pain and restricted level of activity significant for pain, he likely will require a job that does not involve heavy lifting or physical activity. In a June 15, 2004 report, he reviewed appellant's condition by examining him and reviewing his studies. Dr. Hajjar noted that appellant continued to have persistent back pain and right-sided leg pain radiating down his back to his leg to his foot. He noted that at the present time he did not recommend lumbar spine surgery although he did note that appellant had moderate spondylotic changes at the lowest two interspaces. Dr. Hajjar also noted that the cervical spine showed more significant degenerative changes at C5-6 and C6-7 with mild changes at C4-5 and some evidence of C6 radiculopathy.

In a report dated October 18, 2004, Dr. Richard Radnovich, an osteopath, noted that appellant initially came to see him on July 27, 2004 complaining of low back pain. He noted that his examination at the time was inconclusive. Dr. Radnovich noted that since that time he had reviewed appellant's medical record. He noted that, at the time of the first visit, appellant indicated that he thought the mechanism for his injury was an aircraft ejection that happened 14 years ago. However, Dr. Radnovich indicated that, in reviewing appellant's extensive chart, it appeared that low back pain was never addressed as part of the ejection injury nor was radicular pain ever mentioned. He further noted that, in his conversations with appellant, he was never able to make a direct connection between the ejection and the low back pain. Dr. Radnovich noted that there were mentions of low back pain in chart notes for April 1994 and December 30, 1996 but at neither time was it related to his ejection from the plane. He noted that in September 1998 appellant saw Dr. Higginbotham and complained of low back pain and

that this was the first time he related it to the ejection. However, there was a notation of no radiation of pain to leg. Dr. Radnovich noted that, following the work injury of December 19, 2001, there are notes in January, May, July and November 2002 noting low back pain. He opined:

> "I believe that [appellant] suffered an injury on December 19, 2001. It is impossible to determine what the true nature of the injury was at that time, but I believe that it is likely that it was an annulus tear of his dis[c] at L5-S1 causing a chemical irritation of his nerve roots causing a radiating pain down his leg. I believe that documents support this, despite the fact that he did not seek immediate medical attention after the injury. He did have at least five interactions with healthcare providers directly concerning his lower back after this injury and I believe that only one or two consultations to a physician for his low back pain prior to this date. Neither of those encounters included the radicular component of pain into his right leg. Of course, there was likely an underlying predisposition, *i.e.,* the likely degenerative changes that already existed and perhaps connective tissue damage that occurred due to his ejection injury. This, however, is quite speculative and I repeat that we do not know that he had many more visits for his low back after the date of December 19, 2001 than before and that his symptom pattern was different after that date than before and that his injury pattern is consistent with a different diagnosis. I again, therefore, conclude that his lumbar and radicular complaints are more likely than not attributable to the injury dated December 19, 2001."

By decision dated May 9, 2005, the Office reviewed appellant's case on the merit and denied modification as fact of injury had not been established. It noted that factual inconsistencies were so great that appellant had not established an injury. Carolyn Schwab, supervisory claims examiner, noted that appellant waited over one year before telling a physician about the employment incident of December 19, 2001. She also noted that appellant was a capable historian with regard to other injuries sustained over the years. Ms. Schwab found that these inconsistencies combined with lack of persuasive medical evidence of causal relationship negates the factual component of "fact of injury." Accordingly, the Office modified the May 23, 2003 decision to reflect that the factual component of "fact of injury" had not been established.

On November 28, 2005 appellant requested reconsideration. In support thereof, appellant submitted notes dated from September 2, 2004 through August 26, 2005 from Dr. Radnovich indicating that he suffered from depression, lumbalgia and other enthesopathy of elbow. These reports also indicate that appellant was complaining of back pain. Appellant also submitted physical therapy notes, which indicated that he was seen for a total of 22 visits between July 9 and October 29, 2003. He also submitted a note by Dr. R. Tyler Frizzeell, a Board-certified neurosurgeon, dated May 27, 2004, who indicated that appellant had permanent restrictions that were directly related to his military injury of May 17, 1990, with no apportionment. Finally, appellant submitted treatment notes by a licensed massage therapist.

By decision dated December 13, 2005, the Office found that the evidence submitted was insufficient to require merit review of the case.

On April 18, 2006 appellant requested reconsideration. By decision dated May 23, 2007, the Office reviewed appellant's claim on the merits.[2] It determined that, although the evidence was sufficient to support that the incident occurred as alleged, appellant's "behavior" was inconsistent with having sustained a compensable injury and there was no contemporaneous medical evidence to establish an injury occurred as alleged. The Office then determined that appellant's application was not sufficient to warrant modification of the prior decision for the reason that the factual component of fact of injury had not been established.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[3] has the burden of establishing the essential elements of his 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.[4]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether the fact of injury has been established. There are two components involved in establishing the fact of injury. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place and in the manner alleged.[5] Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.[6] An employee may establish that the employment incident occurred as alleged, but fail to show that his disability and/or condition related to the employment incident.

The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred. An injury 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 statements must be consistent with the surrounding facts and circumstances and his or her subsequent course of action.[7] An employee has not met

[2] Appellant's request for reconsideration was filed on April 18, 2006 and the Office did not issue its decision until over one year later on May 23, 2007. In letters to appellant's senator and congressman, the Office explained this delay was caused by a clerical error. The Office's procedures state that, if a reconsideration decision is delayed beyond 90 days and the delay would jeopardize a claimant's ability to seek a merit review of his claim before the Board, the Office shoulder conduct a merit review and issue a decision so as to protect appellant's right to appeal. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 1602.7 (January 1992); *see also Ronald A., Eldridge*, 53 ECAB 218 (2001). Accordingly, the Office properly reviewed the case on the merits.

[3] 5 U.S.C. §§ 8101-8193.

[4] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[5] *John J. Carlone*, 41 ECAB 354 (1989); *see* 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. §§ 10.5(ee), 10.5(q) (traumatic injury and occupational disease defined).

[6] *Shirley A. Temple*, 48 ECAB 404 (1997).

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

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] However, 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.[10]

ANALYSIS

As previously indicated, there are two criteria that must be met in order for appellant to establish that he sustained a traumatic injury in the performance of duty. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place and in the manner alleged. Second, the employee must submit medical evidence to establish that the employment incident caused a personal injury.[11]

In the May 23, 2003 decision, the Office found that, although the evidence established that the event occurred as alleged, there was no medical evidence provided that established a medical diagnosis connected with the accepted event. In its October 24, 2003 decision, it denied modification. However, in the Office's May 9, 2005 decision, it found that the factual inconsistencies are so great that appellant has not established that an injury occurred within the meaning of the Act. The Office noted that this coupled with the absence of persuasive medical evidence of causal relationship, indicated that appellant had not established an injury as alleged. It proceeded to modify the prior decision by stating that the factual component of "fact of injury" had not been established. In the May 23, 2007, the Office again denied appellant's claim for the reason that the factual component of fact of injury had not been established. The Board notes that this decision is somewhat confusing as it also indicates that the incident occurred as alleged but was denied because no contemporaneous medical evidence was submitted. The Office appears to intermingle the criteria to the extent that it is not entirely clear as to the exact grounds for denying appellant's claim. Nevertheless, its statement that the factual component of fact of injury had not been established, especially when combined with the fact that the May 9, 2005 decision specifically modified the prior finding that the incident occurred as alleged and the fact that the Office refers to factual inconsistencies indicates that it denied appellant's claim for the reason that appellant did not establish that the incident occurred as alleged.

The Board finds, notwithstanding, that the Office's finding that appellant did not establish that the incident occurred due to great factual inconsistencies is without merit. The Board initially notes that appellant promptly filed his claim on December 20, 2001, just one day after the alleged incident. Accordingly, there was no delay in filing the claim. Second, appellant

[8] *Id.*

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

[10] *Gregory J. Reser*, 57 ECAB 277 (2005).

[11] *Paul Foster* 56 ECAB 208 (2004).

submitted numerous statements from various military officers from the employing establishment indicating that there was a December 19, 2001 incident. Furthermore, Brigadier General Saylor indicated that, since the December 2001 incident, appellant had not been able to perform his duties satisfactorily and was facing possible medical elimination which indicates that he did not perform his job without difficulty. The Office appears to give great weight to the fact that appellant did not seek prompt medical treatment. Appellant explained this delay by indicating that he thought he had only pulled a muscle and noting that he was already on medication for an August 2001 incident. He also noted that he was told by representatives of the employing establishment not to incur any further bills without medical authorization as they were attempting to determine who was liable for appellant's bills. Appellant's statements are supported by the statements of the military officers. In particular, Sergeant Beckman stated that appellant was told by legal and medical personnel to not incur any unauthorized treatment or bills and that appellant had no reason not to listen to this advice. In addition, the Office's statement in its May 23, 2007 decision, indicating that there was no evidence that appellant mentioned the December 19, 2001 incident to a medical provider until well over a year after the incident is contradicted not only by the medical evidence but also by the Office's notation in the same decision that Dr. Adams mentioned the December 19, 2001 incident in her July 29, 2002 report. Furthermore, appellant's description of how the incident occurred was totally consistent whether he was giving a statement to the Office, to the employing establishment or the doctors, *i.e.*, appellant indicated that he injured himself when he stepped on a flashlight. 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 and persuasive evidence.[12] Not only is there no strong evidence contradicting appellant's statement as to how the incident occurred but there is considerable evidence supporting appellant's statement. Accordingly, the Board finds that the Office improperly determined that appellant did not establish that the incident occurred as alleged.

In the decision dated May 23, 2003, the Office determined that no medical evidence was provided that established a medical diagnosis in connection with the accepted event. As previously stated, it later modified this decision to indicate that the "factual component of fact of injury had not been established." The last time the medical evidence was completely evaluated with regard to causal relationship was in the May 23, 2003 decision. Subsequent to this decision, substantial medical evidence was received. This included reports by Dr. Radnovich including an October 18, 2004 report wherein he concluded that appellant's lumbar and radicular complaints are more likely than not attributable to the December 19, 2001 injury. This medical evidence must be considered in order to determine whether appellant has met the second criteria of fact of injury, *i.e.*, establishing that the now accepted employment incident caused a personal injury. However, the more recent medical evidence was never considered in great detail with regard to causal relationship, rather the Office discussed it mainly in connection with whether appellant established that the incident occurred. Accordingly, the Board remands this case in order for the Office to issue a decision with regard to whether appellant has established that the accepted incident of December 19, 2001 caused a personal injury.

[12] *Allen C. Hundley*, 53 ECAB 551 (2002).

CONCLUSION

The Board finds that appellant established that the employment incident occurred as alleged. The Board finds that the case must be remanded for further consideration as to whether the medical evidence establishes that a medical condition resulted from this accepted incident.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 23, 2007 is affirmed in part and vacated in part. The case is remanded for further consideration consistent with this opinion.

Issued: August 15, 2008
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