

By letter dated November 21, 2007, 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.

In a report dated November 14, 2007, Dr. W. Lee Warren, a specialist in neurosurgery, stated:

“I have evaluated [appellant] for back pain and lower extremity weakness and pain. He had two artificial lumbar discs placed in Germany several years ago and has never had any improvement in his symptoms. After evaluating him, I have recommended that he see Dr. Timothy Holt in Montgomery, and I believe that he will require surgical removal of the artificial discs and fusion surgery to relieve his symptoms. In the meantime, he in my opinion is completely disabled and should not do any strenuous work of any type.”

Appellant also submitted chart notes from a nurse dated November 15, 2007.

By decision dated December 21, 2007, the Office denied the claim, finding that appellant had failed to meet his burden to establish fact of injury.

LEGAL PRECEDENT

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it must first be determined whether “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.¹ 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.² 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 his subsequent course of action.

ANALYSIS

In this case, appellant has not established fact of injury because he failed to submit sufficient evidence establishing that he experienced a specific event, incident or exposure occurring at the time, place and in the manner alleged. He stated on his Form CA-1 that on October 22, 2007 he felt sharp pains in his hips, knees and left leg and began to experience loss of feeling in his left leg and tingling in his right leg. Appellant did not describe any specific employment event, incident or exposure which could have these symptoms. The Office in its November 21, 2007 developmental letter asked appellant to submit a personal statement containing a detailed description as to how his injury occurred. It indicated that he needed to show that the injury occurred at a specific time and place and affected a specific member or

¹ *John J. Carlone*, 41 ECAB 354 (1989).

² *Id.* For a definition of the term “injury,” see 20 C.F.R. § 10.5(ee).

function of the body. However, appellant did not submit an additional statement in response to the Office's letter. 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.³ Appellant however failed to provide even this evidentiary statement.

The Office requested that appellant submit additional factual and medical evidence explaining how he sustained an injury on the date in question. Appellant failed to submit such evidence.⁴ Therefore, the Board finds that there is insufficient evidence to establish that appellant sustained an injury in the performance of duty as alleged.⁵

CONCLUSION

The Board finds that the Office properly found that appellant failed to meet his burden of proof to establish that he sustained an injury in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the December 21, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 12, 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

³ *S.P.*, 59 ECAB ____ (Docket No. 07-1584, issued November 15, 2007); *Wanda F. Davenport*, 32 ECAB 552, 556 (1981).

⁴ The Board notes that the November 15, 2007 chart notes from appellant's nurse do not constitute medical evidence pursuant to section 8101(2).

⁵ 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(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).