United States Department of Labor
Employees' Compensation Appeals Board

W.N., Appellant	)	
and	)	**Docket No. 08-1956**
	)	**Issued: April 15, 2009**
TENNESSEE VALLEY AUTHORITY, COLBERT STEAM PLANT, Tuscumbia, AL, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 7, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' hearing representative's decision dated June 3, 2008, which affirmed the Office's November 8, 2007 decision denying his traumatic injury claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant met his burden of proof in establishing that he sustained a traumatic injury in the performance of duty.

FACTUAL HISTORY

On September 25, 2007 appellant, then a 44-year-old fossil mechanic technician, filed a traumatic injury claim alleging that on June 11, 2007 he sustained an injury to his left shoulder while pushing balls to the right side of the mill while in the performance of duty.[1] He stopped

[1] Appellant stated that this was on the same shoulder that was previously injured.

work on September 17, 2007.[2] The employing establishment indicated that it first had notice of the claimed injury on September 25, 2007.

The Office received several medical reports from Dr. A.E. Joiner, Jr., a Board-certified orthopedic surgeon, and treating physician dating from July 31 to September 17, 2007. In a July 31, 2007 report, Dr. Joiner noted that appellant related that he injured his shoulder on June 18, 2007 when he was at work. He indicated that appellant related that "he was using the shoulder quite a bit, at which time he felt something pull in the shoulder and it has just continued to hurt him and he wanted to come back in today and have it evaluated." Dr. Joiner also completed a July 31, 2007 disability certificate advising that appellant could return to full duty. In an August 30, 2007 report, he diagnosed rotator cuff tendinitis/bursitis in the left shoulder and a "possible retear of the rotator cuff." In an August 29, 2007 report, Dr. Jonathan Davis, a Board-certified diagnostic radiologist, advised that a magnetic resonance imaging (MRI) scan of the left shoulder, revealed a full thickness rotator cuff tear and acromioclavicular degenerative changes with subacromial and subdeltoid effusions.

In a September 25, 2007 statement, appellant advised that the date of the injury was June 11, 2007 not June 18, 2007. He explained that he saw Dr. Joiner on June 28, 2007 and, when asked about the date of injury, he stated, "a week or so ago." Appellant stated that Dr. Joiner inadvertently wrote June 18, 2007 but it should have been June 11, 2007. He also explained that "the reason for all of my confusion is that I was under the impression that this was the same injury, not a new claim. This is also why I believe there is no documentation to support my injury."

By letter dated October 2, 2007, the Office requested that appellant provide additional factual and medical information.

In an October 9, 2007 report, Dr. Joiner noted that appellant was seen on July 31, 2007. He indicated that appellant informed him at that time that he "reinjured his left shoulder at work on June 18, 2007." Dr. Joiner indicated that appellant appeared to have a new tear of his rotator cuff which was going to require surgery.

On October 15, 2007 the Office received a report dated November 30, 2006, from Dr. Gary Daniel, Board-certified in family medicine, who advised that appellant was in "for a return to work (nonwork-related/injury/illness), a fitness for duty and also a review of medical constraints." Dr. Daniel noted that appellant was out of work for "approximately three to four months for a nonwork-related problem and has been kept off work for treatment for anger management and for alcohol abuse and dependence." He indicated that appellant was currently in treatment. Dr. Daniel also noted that appellant was in the yard the previous day attending to a dog when he fell. He indicated that appellant was having "severe pain in his left shoulder again." Dr. Daniel advised that appellant could return to work. The Office also received a nurse's notes from August 7 to September 4, 2007. An August 7, 2007 note reported that appellant had stated on July 31, 2007 that he had reinjured his shoulder on June 18, 2007 when

[2] The record reflects that appellant has an accepted work-related June 28, 2006 employment injury to the left shoulder under claim File No. xxxxxx927.

he was at work. The nurse stated that appellant related that he was using his shoulder quite a bit when he felt something pull in the shoulder and it continued to hurt him.

The employing establishment controverted the claim and submitted a September 12, 2007, statement from Doug Keeling, a manager, who alleged that appellant had not reported or filed a claim for an alleged work injury on June 18, 2007 and that the present matter should not be treated as a "new injury." Further, Mr. Keeling alleged that the injury could "not be substantiated by work orders for the date claimed or by alleged witnesses and there was no report of injury made to his foreman as the claimant has alleged." He also indicated that Dr. Daniel's November 30, 2006 report supported that appellant's condition related to an incident where he had fallen in his front yard while tending to his dogs. Mr. Keeling asserted that the evidence from appellant did not support that he was reinjured at work. In an October 4, 2007 letter, he advised that appellant did not report injury to his foreman until August 30, 2007. While Mr. Keeling noted that appellant alleged that he earlier reported the injury to his foreman, the foreman did not confirm appellant's statement. He also alleged that, when told that the date was not consistent with how the injury occurred, appellant changed the date of the injury to June 26, 2007. Mr. Keeling stated that appellant "changed the date again from June 26 to 11, 2007 when he filed his [Form] CA-1. In filing his [Form] CA-1 on September 25, 2007 [appellant] claimed: 'I double checked later to learn it was in fact the 11th.'" Mr. Keeling also noted that, between June 11 and August 5, 2007, appellant was in the health station on numerous occasions and never mentioned another injury. He stated that appellant only changed the date of injury to June 11, 2007 after management told him that the first two dates were inconsistent with work records for those days. Mr. Keeling asserted that he believed that appellant "reviewed the work records finding a date to coincide with his alleged injury and reported that date, his third reported date of injury." He reiterated that appellant had an injury at home and another injury under claim File No. xxxxxx485. Furthermore, Mr. Keeling noted that appellant was "showing a pattern of behavior or elusiveness which raises doubt as to the validity of the claim."

By decision dated November 8, 2007, the Office denied appellant's traumatic injury claim on the grounds that he had not established that an incident occurred in the performance of duty and had not submitted medical evidence rendering a diagnosis that could be connected to the claimed work-related events.

On November 13, 2007 appellant's representative requested a telephonic hearing, which was held on February 12, 2008. During the hearing, appellant alleged that he was moving metal balls weighing approximately 300 pounds, when he hurt his left shoulder. He also indicated that he informed the foreman that he hurt his shoulder but he did not keep a record of the date. Appellant added that the foreman instructed him to go to the plant nurse. He alleged that the nurse thought that his shoulder was probably hurting due to the weather and that he did not recall seeing her make a notation or fill out a claim form. Appellant explained that his shoulder continued to hurt and that he revisited the nurse on July 17, 2007, at which time she determined that he may have aggravated his shoulder and advised him to take anti-inflammatory medication. He alleged that he went back to see the nurse a few more times before she advised him to go see his doctor. Appellant further attempted to explain the discrepancies regarding the date of the injury. He noted that he had an accepted shoulder injury, for which he had surgery on November 10, 2006, and he believed that he had aggravated his left shoulder. Appellant alleged

that he did not fill out the claim form until September 2007 and that he was not sure when the date of injury occurred but he believed that it was on or about July 17, 2007.

In a December 19, 2007 letter, appellant's representative alleged that the actual date of the injury was July 17, 2007 not June 11, 2007. He denied that appellant intended to defraud the employing establishment and sought to explain the discrepancies regarding the date of the injury. In particular, appellant's representative noted that appellant originally injured his left shoulder in June 2006 and underwent surgery in November 2006, which was accepted by the Office. He also alleged that, on June 18, 2007, a prescription was called in for appellant. Additionally, appellant's representative noted that on or about July 17, 2007 appellant was working with his crew when he placed stress on his left shoulder. He alleged that appellant informed Dondale Goodloe, the crew supervisor, that his shoulder was hurt and he was instructed to see the nurse. Appellant's representative noted that it was not initially clear whether this was a new injury or an aggravation of the old one. He noted that appellant visited the nurse at least three times between the date of the injury and July 31, 2007, the date he saw his physician. Appellant's representative indicated that appellant informed his supervisor on July 19, 2007 that he had reinjured his arm. Additionally, he noted that when appellant saw Dr. Joiner on July 31, 2007, he indicated that he hurt his shoulder a "couple of weeks ago." The representative stated that it was unclear why Dr. Joiner selected June 18, 2007 and when contacted, the physician's office did not recall the June 18, 2007 notation. He alleged that it was possible that Dr. Joiner was in the "June mind set" and wrote "June 18[, 2007] rather than July 18[, 2008] as the date of the new injury." Appellant's representative stated that appellant called the doctor for additional pain medication and it was possible that Dr. Joiner assumed that this was the date of the injury when preparing his notes. He advised that, after appellant underwent therapy without improvement, Dr. Joiner ordered an MRI scan on August 21, 2007, which revealed a possible rotator cuff "retear." Appellant was instructed to fill out new paperwork as it was a new injury, but appellant could not recall the exact date. He decided to look at Dr. Joiner's paperwork, which as noted, had the incorrect date. Thereafter, appellant met with his union steward and looked up the records nearest to the date that appellant was working with his crew when he injured his shoulder. Appellant's representative related that the records revealed that the date was June 11, 2007, the date appellant listed on the claim form. He stated that it was not unusual for there to be a delay in reporting when there were two injuries. Appellant's representative reiterated that appellant's physician initially thought he had irritated his old injury until MRI scan results indicated a new injury. He noted that the actual date of injury was determined to be July 17, 2007.

In a January 23, 2008 letter, appellant's representative, provided additional evidence which included a January 17, 2008 letter from the Assistant Inspector general concluding that appellant did not file a false claim.[3] The Office received physical therapy notes dated March 19 and August 19, 2007 and copies of treatment notes from a nurse dated September 21, 24 and 27 and October 16, 2007.

[3] The Office had previously received a draft report from the Office of the inspector general, which had conducted an investigation into whether appellant filed a false workers' compensation claim during September 2007.

In an April 24, 2008 response, Mr. Keeling referenced Dr. Daniel's November 30, 2006 report and noted that notes from the employing establishment's nurse indicated that appellant never had shoulder surgery. Furthermore, the nurse indicated that she saw appellant for complaints of pain after he was released to full duty between June 11 and August 6, 2007. The employing establishment also submitted further evidence. In a statement received April 30, 2008, Corey Saint noted that, on August 20, 2007, another supervisor advised him that appellant had been complaining about his shoulder aggravating him. He indicated that the nurse contacted him to let him know that appellant had reinjured his shoulder and was going to have surgery but that it was going to be problematic as he had not reported the injury. In a statement dated September 12, 2007, Randall Scott noted "dual rating" appellant from July 19 to 30, 2007 and stated that appellant advised him that he had aggravated his shoulder on a "20k" while Mr. Scott was on annual leave. Mr. Scott noted that he informed Mr. Goodloe who recommended that appellant see a nurse. In a September 13, 2007 statement, Mr. Goodloe, appellant's foreman, noted that appellant did not report an injury to him on June 18, 2007 or June 26, 2008. He advised that, if an injury had been reported, he would have completed a form and sent appellant to the employing establishment's nurse. Mr. Goodloe also stated that, during August 2007, appellant approached him on about three occasions regarding his shoulder but he could not recall the dates.

Appellant submitted a response which was received on May 30, 2008. He indicated that he had notified Dr. Joiner that he had fallen at home and denied that he had fabricated any statements. Appellant also reiterated that he had informed the nurse about his shoulder, but that she did not take him seriously. He also alleged that his foreman failed to have him sign an injury report and instead, merely directed him to go see the nurse. Additionally, he alleged that, when his surgery was denied, he contacted the nurse and that she informed his physician's nurse that he should have the surgery and then seek reimbursement afterwards. Appellant alleged that he reported his injury and that his supervisor did not initially give him a form.

By decision dated June 3, 2008, the Office hearing representative affirmed the Office's November 8, 2007 decision.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act[4] has the burden of establishing 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[5] and that an injury was sustained in the performance of duty.[6] These are the essential elements of each compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[7]

[4] 5 U.S.C. §§ 8101-8193.

[5] *Joe D. Cameron*, 41 ECAB 153 (1989).

[6] *James E. Chadden Sr.*, 40 ECAB 312 (1988).

[7] *Delores C. Ellyet*, 41 ECAB 992 (1990).

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.[8] In some traumatic injury cases, this component can be established by an employee's uncontroverted statement on the Form CA-1.[9] 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.[10]

An alleged work incident 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 statement must be consistent with the surrounding facts and circumstances and his subsequent course of action.[11] A consistent history of the injury as reported on medical reports to the claimant's supervisor and on the notice of injury can also be evidence of the occurrence of the incident.[12] 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.[13] Although 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,[14] an employee has not met this burden when there are inconsistencies in the evidence such as to cast serious doubt upon the validity of the claim.[15]

ANALYSIS

The Board finds that appellant has not established fact of injury due to inconsistencies in the evidence that cast serious doubt as to whether the specific traumatic incident occurred at the time, place and in the manner alleged. Appellant alleged on his September 25, 2007 notice of traumatic injury that on June 11, 2007, he injured his left shoulder while pushing balls to the right side of the mill in the performance of duty. He also alleged that he reported the injury to his foreman. In a July 31, 2007 report, however, Dr. Joiner noted that appellant injured his shoulder on June 18, 2007 while at work. He repeated that the date of injury was June 18, 2007

[8] *Julie B. Hawkins*, 38 ECAB 393, 396 (1987); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2a (June 1995).

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

[10] *See id.*

[11] *Rex A. Lenk*, 35 ECAB 253, 255 (1983).

[12] *Id*. at 255-56.

[13] *Dorothy M. Kelsey*, 32 ECAB 998 (1981).

[14] *Id.*

[15] *Joseph A. Fournier*, 35 ECAB 1175 (1984).

in his October 9, 2007 report. In nurses' notes dated August 7 and September 4, 2007, they included an annotation that appellant indicated that he had injured himself on June 18, 2007. However, appellant's representative alleged that the date of injury was actually July 17, 2008 and not June 11, 2007. He tried to explain the confusion by explaining that Dr. Joiner made a mistake and was in the "June mind set" when he wrote "June 18, 2007 rather than July 18, 2008 as the date of the new injury." Appellant's representative also indicated that appellant called in for additional pain medication and it was possible the doctor assumed this was the date of the new injury. Appellant did not submit any other evidence, such as witness statements or medical records, which tended to confirm that he sustained an injury on July 17, 2008.

The Board notes that the employing establishment denied that appellant reported or filed a claim for a new injury on July 17, 2008 or any other date alleged by appellant. The employing establishment manager, Mr. Keeling, indicated that appellant's injury could not be substantiated by work orders, witnesses, or a report of injury to his foreman until August 30, 2007. He explained that, when appellant was informed that the date was not consistent, "he reviewed the work records finding a date to coincide with his alleged injury and reported that date, his third reported date of injury." Mr. Keeling indicated that appellant changed the date of injury from June 26 to June 11, 2007. He also indicated that, between June 11 and August 5, 2007, appellant was in the health station on numerous occasions, and never mentioned another injury. Furthermore, Mr. Keeling noted that appellant had an injury at home and another injury. He indicated that appellant was "showing a pattern of behavior or elusiveness which raises doubt as to the validity of the claim." Mr. Goodloe, appellant's foremen advised that appellant did not report a work injury to him in July 2007. Other statements from employing establishment do not support that appellant contemporaneously reported a work injury in July 2007.

The Board finds that the circumstances of this case cast serious doubt upon the occurrence of a June 11 or a July 17, 2007 incident in the manner as described by appellant. Appellant has given differing dates on which the alleged injury occurred and has not provided sufficient explanation or corroborating evidence to overcome the inconsistency regarding when the claimed injury occurred. On the other hand, the employing establishment has submitted various statements from individuals who worked with or oversaw appellant during the period in question and none of these individuals indicated that appellant claimed an injury on any of the dates in question. Given the inconsistencies in the evidence regarding when he sustained his injury, the Board finds that there is insufficient evidence to establish that appellant sustained a traumatic incident in the performance of duty as alleged.

CONCLUSION

The Board finds that appellant has not met his burden of proof in establishing that he sustained an injury in the performance of duty.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 3, 2008 is affirmed.

Issued: April 15, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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