United States Department of Labor
Employees' Compensation Appeals Board

R.C., Appellant	)	
and	)	
DEPARTMENT OF ENERGY, ENVIRONMENTAL MANAGEMENT PROGRAM, NORTH FLORIDA/SOUTH GEORGIA VETERANS HEALTH SYSTEM, Lake City, FL, Employer	)	**Docket No. 08-2422** **Issued: June 16, 2009**

Appearances:
Fred L. Brittain, Sr., 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 September 3, 2008 appellant filed a timely appeal from a November 16, 2007 merit decision of the Office of Workers' Compensation Programs denying continuation of pay and a December 19, 2007 merit decision denying his claim for an employment-related injury. He also timely appealed a July 16, 2008 nonmerit decision of the Branch of Hearings and Review denying his request for an oral hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUES

The issues are: (1) whether the Office properly denied continuation of pay on the grounds that appellant failed to give written notice of injury within the time limitation provision of the Federal Employees' Compensation Act; (2) whether he established that he sustained an injury on August 23, 2007 in the performance of duty; and (3) whether the Branch of Hearings and Review properly denied his request for an oral hearing as untimely. On appeal, appellant's

representative contended that appellant injured his back on August 14, 2006 while operating a floor buffer.

FACTUAL HISTORY

On November 8, 2007 appellant, then a 50-year-old housekeeping aid, filed a traumatic injury claim (Form CA-1) alleging that on August 23, 2007 he experienced low back pain while using a floor scrubber and that he sustained a sprain/strain of his lower back and buttocks. The employing establishment noted that he did not miss any time from work.

By decision dated November 16, 2007, the Office denied continuation of pay on the grounds that appellant did not report his injury on an Office approved form within 30 days.

In a November 16, 2007 letter, the Office notified appellant of the deficiencies in his claim and requested additional information.

In a worksheet, J. Craig, a certified rehabilitation registered nurse, stated that he was referred to appellant's case on November 16, 2007.[1] He noted that appellant had stopped work on October 16, 2007. Mr. Craig stated that he called appellant on November 16, 2007 and that appellant had returned his call. Appellant stated that on August 23, 2007 he aggravated a previous August 14, 2007 injury and that he was returning to work on December 5, 2007. Mr. Craig informed appellant that he needed to mail medical documentation to the Office within 30 days. He also noted that appellant underwent surgery on November 13, 2007.

In an August 23, 2007 medical note, Richard Medeiros, an advanced registered nurse practitioner, stated that appellant had low back pain on his left side that radiated into his left thigh. Appellant stated that he had back pain the day prior and when he got out of the car that morning the pain worsened. He also stated that this was not an on-the-job injury.

In a December 19, 2007 decision, the Office denied the claim, finding that appellant did not establish that the incident occurred as alleged because the medical evidence was inconsistent with his statements in his claim.

Appellant filed a request for an oral hearing before an Office hearing representative. The envelope containing the request was postmarked May 27, 2008.

By decision dated July 16, 2008, the Office denied appellant's request for an oral hearing on the grounds that his request was not made within 30 days after the issuance of the December 19, 2007 decision. It also found that the issue could be equally well addressed by appellant requesting reconsideration and submitting new evidence.

[1] It appears the worksheet was signed on November 13, 2007; however, most of the conversations Mr. Craig referenced in the document occurred subsequent to that date.

LEGAL PRECEDENT -- ISSUE 1

Section 8118[2] of the Act[3] provides for payment of continuation of pay, not to exceed 45 days, to an employee who has filed a claim for a period of wage loss due to traumatic injury with her immediate supervisor on a form approved by the Secretary of Labor within the time specified in section 8122(a)(2) of this title. Section 8122(a)(2)[4] provides that written notice of injury must be given as specified in section 8119. The latter section provides in part that notice of injury shall be given in writing within 30 days after the injury.[5]

Claims that are timely under section 8122 are not necessarily timely under section 8118(a). Section 8118(a) makes continuation of pay contingent on the filing of a written claim within 30 days of the injury.[6] When an injured employee makes no written claim for a period of wage loss within 30 days, he is not entitled to continuation of pay, notwithstanding prompt notice of injury.[7]

The Act's implementing regulations provide, in pertinent part, that to be eligible for continuation of pay, a claimant must: (1) have a traumatic injury which is job related and the cause of the disability, and/or the cause of lost time due to the need for medical examination and treatment; (2) file Form CA-1 within 30 days of the date of the injury; and (3) begin losing time from work due to the traumatic injury within 45 days of the injury.[8]

ANALYSIS -- ISSUE 1

On November 8, 2007 appellant filed a notice of traumatic injury (Form CA-1) for an alleged August 23, 2007 employment injury. Because the claim was not filed within 30 days of the injury, as specified in section 8118(a) and 8122(a)(2) of the Act, the Board finds that he is not entitled to continuation of pay.[9]

LEGAL PRECEDENT -- ISSUE 2

An employee who claims benefits under the Act[10] has the burden of establishing the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the

---

[2] 5 U.S.C. § 8118.

[3] *Id.* at §§ 8101-8193.

[4] *Id.* at § 8122(a)(2).

[5] *Id.* at § 8119(a), (c). *See also Gwen Cohen-Wise*, 54 ECAB 732 (2003).

[6] *Id.* at § 8119(a).

[7] *Laura L. Harrison*, 52 ECAB 515 (2001).

[8] 20 C.F.R. § 10.205(a)(1-3). *See also Carol A. Lyles*, 57 ECAB 265 (2005).

[9] *See Laura L. Harrison*, 52 ECAB 515 (2001).

[10] 5 U.S.C. §§ 8101-8193.

reliable, probative and substantial evidence.[11] 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.[12] An employee has not met 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.[13] 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.[14] 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.[15]

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 or she actually experienced the employment incident at the time, place and in the manner alleged.[16] Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.[17]

ANALYSIS -- ISSUE 2

The issue is whether appellant established that he sustained a back and buttocks injury on August 23, 2007 as alleged.

Appellant filed a traumatic injury claim on November 8, 2007 alleging that he injured his back and buttocks while using a floor scrubber on August 23, 2007. However, in a medical note dated August 23, 2007, Mr. Medeiros reported appellant's claims that he had low back pain the day prior and that he experienced pain when he got out of the car that day. He also relayed appellant's statement that his injury was not work related.

[11] *D.B.*, 58 ECAB ___ (Docket No. 07-440, issued April 23, 2007); *George W. Glavis*, 5 ECAB 363, 365 (1953).

[12] *M.H.*, 59 ECAB ___ (Docket No. 08-120, issued April 17, 2008); *George W. Glavis*, *supra* note 11.

[13] *S.P.*, 59 ECAB ___ (Docket No. 07-1584, issued November 15, 2007); *Gus Mavroudis*, 9 ECAB 31, 33 (1956).

[14] *M.H.*, *supra* note 12; *John D. Shreve*, 6 ECAB 718, 719 (1954).

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

[16] *Bonnie A. Contreras*, 57 ECAB 364, 367 (2006); *Edward C. Lawrence*, 19 ECAB 442, 445 (1968).

[17] *T.H.*, 59 ECAB ___ (Docket No. 07-2300, issued March 7, 2008); *John J. Carlone*, 41 ECAB 354, 356-57 (1989).

The Board finds that appellant has not met his burden of proof to establish that the August 23, 2007 incident occurred as alleged. The record is devoid of any evidence which would support appellant's recitation of the events of that date. Appellant did not file a claim until several months after the injury and did not submit any evidence indicating that he informed his supervisors of the injury prior to the filing of his claim. Further, on his claim form, the employing establishment noted that appellant did not miss any work, thus, it would appear that he continued to work despite the alleged injury. While appellant did seek contemporaneous medical treatment, Mr. Medeiros's report of appellant's statement on the day of the alleged injury is in direct opposition to appellant's assertions that he injured himself using a floor scrubber at work. While appellant's claims regarding the events of the August 23, 2007 incident are of great probative value, the evidence of record directly refutes his statements, thereby casting serious doubt upon the validity of his claim.[18] Therefore, the Board finds that appellant did not establish that the August 23, 2007 work incident occurred as alleged.[19]

The Board notes that on appeal, appellant's representative contends that appellant injured his back on August 14, 2006 while operating a floor buffer. The only evidence that would begin to support this argument is the worksheet where Mr. Craig related appellant's claims that he aggravated a previous August 14, 2007 injury. However, it is unclear whether Mr. Craig's worksheet is referring to the August 14, 2006 injury alleged on appeal or a different injury occurring a year later. Because there is no other evidence of record relating to an August 14, 2006 or 2007 injury, nor has appellant mentioned this injury in his claim or filed a separate claim alleging this injury, appellant's contention on appeal lacks merit.

LEGAL PRECEDENT -- ISSUE 3

A claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for either an oral hearing or a review of the written record must be submitted in writing, within 30 days of the date of the decision for which a hearing is sought. If the request is not made within 30 days or if it is made after a reconsideration request, a claimant is not entitled to a hearing or a review of the written record as a matter of right.[20] The Board has held that the Office, in its broad discretionary authority in the administration of the Act,[21] has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[22] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when

[18] *See James C. Williams*, 32 ECAB 722 (1981).

[19] *See id*.

[20] *Claudio Vazquez*, 52 ECAB 496 (2001).

[21] 5 U.S.C. §§ 8101-8193.

[22] *Marilyn F. Wilson*, 52 ECAB 347 (2001).

the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.[23]

ANALYSIS -- ISSUE 3

The Office issued a merit decision denying appellant's claim on December 19, 2007. Appellant's request for an oral hearing was postmarked May 27, 2008. As this was over 30 days after December 20, 2007, the Board finds that appellant was not entitled to an oral hearing before a hearing representative as a matter of right.[24] The Office exercised its discretion in this case and found that appellant's claim could equally well be addressed by requesting reconsideration and submitting additional evidence. The only limitation on the Office's authority is reasonableness.[25] Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are contrary to logic and deductions of known facts.[26] There is no evidence of record that the Office abused its discretion in denying appellant's request for a hearing under these circumstances.

Thus, the Board finds that the Office did not abuse its discretion in denying appellant's request for an oral hearing before a hearing representative.

CONCLUSION

The Board finds that appellant is not entitled to continuation of pay for his August 23, 2007 injury as he failed to timely file the notice of injury. The Board also finds that he did not establish that he sustained an injury on August 23, 2007 in the performance of duty. Finally, the Board finds that the Branch of Hearings and Review properly denied his request for an oral hearing as untimely.

[23] *Claudio Vazquez, supra* note 20.

[24] *See Angel M. Lebron, Jr.*, 51 ECAB 488 (2000) (the date of the event from which the designated period of time begins to run shall not be included when computing the time period). *See* 20 C.F.R. § 10.616(a) (the hearing request must be sent within 30 days as determined by postmark or other carrier's date marking).

[25] *Linda J. Reeves*, 48 ECAB 373 (1997).

[26] *See Daniel J. Perea*, 42 ECAB 214 (1990).

ORDER

IT IS HEREBY ORDERED THAT the July 16, 2008 and December 19 and November 16, 2007 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: June 16, 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