

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**R.B., Appellant**

**and**

**DEPARTMENT OF THE ARMY,  
FORT WAINWRIGHT, AK, Employer**

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**Docket No. 08-2094  
Issued: May 1, 2009**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On July 22, 2008 appellant filed a timely appeal from the June 25, 2008 decision of an Office of Workers' Compensation Programs' hearing representative who affirmed the denial of his traumatic injury claim. 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 on June 15, 2007 in the performance of duty.

**FACTUAL HISTORY**

On October 3, 2007 appellant, then a 58-year-old pipefitter, filed a traumatic injury claim alleging that he injured his left shoulder on June 15, 2007 while lifting a wire puller with a frame and motor up to a person on a ladder. He did not stop work. The employing establishment controverted the claim on the basis it was not reported when it occurred and appellant went moose hunting in September 2007. Appellant's supervisor indicated that he received the claim on October 15, 2007 and first received notice of the claimed injury on October 11, 2007.

By letter dated October 16, 2007, the Office asked appellant to submit additional factual and medical information, including a comprehensive medical report from a treating physician which included a reasoned explanation as to how the specific work factors or incidents identified by appellant contributed to his claimed injury.

In an October 20, 2007 response, appellant indicated medical evidence was forthcoming. In a September 25, 2007 return to work slip, Dr. Jimmy M. Tamai, a Board-certified orthopedic surgeon, provided restrictions for appellant's left arm. He advised that appellant was restricted from kneeling, squatting and climbing.

In an October 19, 2007 letter, Jeff Siniscalchi, maintenance supervisor, stated that appellant called in sick on September 17, 2007 and indicated that he had shot a moose over the weekend and was too sore to come to work.

By decision dated December 3, 2007, the Office denied appellant's claim on the basis that fact of injury was not established. It found that the evidence was insufficient to establish the occurrence of the claimed incident.

On December 10, 2007 appellant requested a hearing before an Office hearing representative, which was conducted telephonically on April 18, 2008. In an October 22, 2007 report, Dr. Tamai noted treating appellant for left shoulder rotator cuff tear, left shoulder impingement and dislocated left biceps tendon. He stated that appellant's symptoms of left shoulder pain and dysfunction began in June 2007 when he was at work attempting to pull on a heavy wire. Dr. Tamai advised that a recent magnetic resonance imaging (MRI) scan showed evidence of significant impingement in the left shoulder, dislocated biceps tendon and near complete tear of the rotator cuff. He opined that the rotator cuff tear was caused by the June 15, 2007 incident but the degenerative changes in appellant's acromioclavicular joint were not. Appellant also submitted documents pertaining to his application for disability retirement and treatment for knee and ankle problems in both legs.

At the hearing, appellant stated that there was approximately 2,000 feet of communication cable to be pulled and he believed there were six people working the job. He advised his shoulders became painful at the end of the day and he thought he had pulled a muscle which would get better over time. Appellant indicated that Dr. Tamai was aware of his shoulder pain since June 2007 and had been treating him for a knee condition under file number xxxxxx824. He continued to work moving furniture and equipment and did not believe he mentioned injuring himself to anyone. When appellant next saw Dr. Tamai, he was advised that the MRI scans revealed tears in both shoulders which was consistent with the overhead pulling he had been performing. He also stated that he went moose hunting with his son the weekend of September 3, 2007, but he only drove and did not hunt. Appellant submitted evidence from Dr. Tamai who performed surgery on March 18, 2008 for chondroplasty of the left glenohumeral joint decompression acromioplasty with rotator cuff repair and a left distal clavicle excision.

By decision dated June 25, 2008, the Office hearing representative affirmed the denial of appellant's claim.

## **LEGAL PRECEDENT**

An employee seeking benefits under the Federal Employees' Compensation Act<sup>1</sup> 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 filed within the applicable time limitation, that an injury was sustained while 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.<sup>2</sup> These are the essential elements of each and every compensation claim regardless of whether the claim is predicated on a traumatic injury or an occupational disease.<sup>3</sup>

To determine whether an employee sustained a traumatic injury in the performance of duty, the Office must determine whether fact of injury is established. First, an employee has the burden of demonstrating the occurrence of an injury at the time, place and in the manner alleged, by a preponderance of the reliable, probative and substantial evidence.<sup>4</sup> Second, the employee must submit sufficient evidence, generally only in the form of medical evidence, to establish a causal relationship between the employment incident and the alleged disability and/or condition for which compensation is claimed.<sup>5</sup>

The Office cannot accept fact of injury if there are such inconsistencies in the evidence as to seriously question whether the specific incident occurred at the time, place and in the manner alleged or whether the alleged injury was in the performance of duty,<sup>6</sup> 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 the circumstances and his subsequent course of action.<sup>7</sup> 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.<sup>8</sup>

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> *Anthony P. Silva*, 55 ECAB 179 (2003).

<sup>3</sup> *See Ellen L. Noble*, 55 ECAB 530 (2004).

<sup>4</sup> *Delphyne L. Glover*, 51 ECAB 146 (1999).

<sup>5</sup> *Gary J. Watling*, 52 ECAB 278 (2001); *Shirley A. Temple*, 48 ECAB 404, 407 (1997).

<sup>6</sup> *Elaine Pendleton*, 40 ECAB 1143 (1989).

<sup>7</sup> *See Joseph H. Surgener*, 42 ECAB 541, 547 (1991).

<sup>8</sup> *See Constance G. Patterson*, 42 ECAB 206 (1989).

## ANALYSIS

The Board finds that appellant has not submitted sufficient evidence to establish that he sustained an injury on June 15, 2007 at the time, place and in the manner alleged. Appellant contends that he sustained a left shoulder injury on June 15, 2007 while lifting a wire puller. However, he did not file his claim until October 3, 2007, almost four months after the alleged incident.

There is no evidence that appellant stopped work or lost any time from work due to the June 15, 2007 alleged incident. Appellant's supervisor reported that appellant called in sick on September 17, 2007 after moose hunting that weekend. The supervisor advised that he did not receive notice of an injury until October 2007. The record reflects that appellant did not stop work on June 15, 2007 but continued in his employment without apparent difficulty until notifying his supervisor in October 2007. There are no statements from coworkers supporting that appellant mentioned having any sort of shoulder injury from lifting a wire puller on June 15, 2007. Additionally appellant did not submit any statement explaining the delay in filing his claim, other than noting that he thought he had pulled a muscle that would get better over time.

Moreover, it does not appear that appellant sought medical treatment until September 25, 2007 when Dr. Tamai completed a return to work certificate. However, Dr. Tamai did not relate any history of injury on June 15, 2007. Thereafter, his October 22, 2007 report noted only appellant's history of dysfunction which began in June when attempting to pull a heavy wire. This report was authored more than four months after the claimed injury and after appellant had filed his claim. Dr. Tamai did not address when he first became aware of the claimed incident. As noted, the earliest evidence from Dr. Tamai, a September 25, 2007 return to work report, does not mention the June 15, 2007 incident. The subsequent report of the physician failed to address how the left shoulder conditions, for which surgery was performed on March 18, 2008, were caused or contributed to by the incident alleged by appellant.

Appellant provided late notification of the claimed injury and continued to work for several months without apparent difficulty. The Board finds that his actions were not consistent with his claimed injury and cast serious doubt on the validity of his claim. The Office properly found that appellant did not establish that the June 15, 2007 incident occurred as alleged. Consequently, he has not established his claim.<sup>9</sup>

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<sup>9</sup> As appellant has not established that the claimed June 15, 2007 lifting incident occurred as alleged, it is not necessary to consider whether the medical evidence establishes that the incident caused an injury. *See S.P.*, 59 ECAB \_\_\_\_ (Docket No. 07-1584, issued November 15, 2007).

**CONCLUSION**

The Board finds that appellant did not meet his burden of proof in establishing that he sustained an employment-related injury in the performance of duty.

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 25, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 1, 2009  
Washington, DC

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

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

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