

appellant did not request a (Form CA-1) claim for an injury on the job. The employing establishment challenged the claim based on the late submission. In a letter dated August 15, 2008, the Office informed appellant that additional factual and medical information were needed to establish his claim and accorded him 30 days to provide such information.

Appellant submitted a July 3, 2008 report from Dr. Jack Facciolo, an osteopath specializing in orthopedic surgery, who advised that he initially presented on May 22, 2007 with right shoulder pain. He indicated that he had tripped six months prior when he caught his arm on a shelf and severely twisted it. Dr. Facciolo noted appellant's treating physician had offered conservative treatment but, because of continued pain and weakness, a magnetic resonance imaging (MRI) scan was ordered which revealed a massive rotator cuff tear that was several months old. He indicated that appellant underwent an arthroscopic debridement and open rotator cuff repair on May 31, 2007. Dr. Facciolo stated that he had a functional arm and shoulder but weakness would remain. He opined that appellant suffered a massive rotator cuff tear to his right shoulder as a result of his fall. Dr. Facciolo further opined it was difficult to say with any certainty that working had made his problem worse, as he had not evaluated him through that period to see a progression in his symptoms.

In a September 18, 2008 decision, the Office denied the claim finding that appellant had not submitted factual evidence supporting his claim and that the medical evidence was insufficient.

On September 23, 2008 appellant, through his attorney, requested a hearing, which was held on February 25, 2009.

In a September 14, 2008 statement and at the hearing, appellant explained the circumstances surrounding his injury. He injured his right shoulder on October 12, 2006 when he tripped and caught his shoulder in a cage. Appellant stated that he immediately notified his supervisor, Mr. Henry, when the incident occurred. He also stated that he started to feel shooting pains a few days after the fall and, when the pain became worse, he called his family physician and saw him on November 6, 2006 where he underwent a series of x-rays. Appellant saw his family physician on December 8, 2006, February 25, April 10 and May 4, 2007. He was prescribed pain medicine and had cortisone shots. Appellant had an MRI scan on May 11, 2007, saw his orthopedic surgeon on May 22, 2007 and had surgery on May 31, 2007. He stated that, right before he went for the MRI scan, his shoulder turned black and blue and became swollen, which he attributed to working following the injury. Appellant had to overcompensate with his right shoulder due to the damage to his left shoulder from a 2004 injury and because the employer did not modify his duties due to his injured left arm. He did not bother to claim the injury to his right shoulder because of the problems he went through to get his left shoulder claim approved.¹ Appellant advised that he had no other injuries to his right shoulder after he injured it on October 12, 2006.

In a February 16, 2009 report, Dr. Facciolo clarified his earlier report of July 3, 2008. He advised that when appellant had indicated that he had tripped six months prior and injured his right shoulder, the date was October 12, 2006. Dr. Facciolo indicated that he fell at work on

¹ Matters regarding any left shoulder condition are not before the Board on the present appeal.

October 12, 2006 and had a massive rotator cuff tear. He further stated that appellant seemed to respond well to surgery and it was not unusual for persistent weakness to occur after a rotator cuff tear was repaired.

In a May 19, 2009 decision, an Office hearing representative affirmed the September 18, 2008 decision. She found that appellant did not establish that he sustained an injury in the time, place or manner alleged or a medical condition in connection with the alleged injury.

In an August 13, 2009 letter, counsel requested reconsideration. He indicated that he was submitting treatment records from appellant's family physician, Dr. Wayne Schneider, a Board-certified family practitioner, as well as a November 6, 2006 office note from Dr. Facciolo, which verified that appellant had tripped and hurt his right shoulder.

On September 1, 2009 the Office received a January 27, 2009 medical note from a podiatrist regarding the left great toe; a May 31, 2007 outpatient report from Cape Regional Medical Center, Department of Pathology and Laboratory Services; reports dated July 5 to August 23, 2007 pertaining to a renal insufficiency and a July 9, 2008 report regarding a nephrology follow-up. Page five from a November 6, 2006 history intake form of the Family Practice Associates, Dr. Schneider's office, was submitted. It did not contain any information pertaining to appellant's right shoulder.

A November 9, 2006 right shoulder x-ray report noted a history of pain. Records from Dr. Schneider's office dated November 13, 2006 to January 23, 2009 were received. The entries indicate appellant was looking for x-ray results on November 13, 2006, which were reported as normal; a cortisone injection for right shoulder pain was given and pain medication prescribed on November 17, 2006; a cortisone shot for right shoulder pain was given on April 10, 2007; positive findings for muscle weakness and rotation on right shoulder were found and appellant was referred for an MRI scan on May 4, 2007; MRI scan results were positive for rotator cuff tear on May 15, 2007; appellant was given MRI scan results and referred to Dr. Facciolo on May 16, 2007.

In a May 11, 2007 note, Dr. Schneider ordered an MRI scan of appellant's right upper extremity due to shoulder pain. The May 11, 2007 MRI scan report noted a clinical history of loss of motion and weakness as well as trauma in November 2006. An impression of massive full thickness tear of the supraspinatus and infraspinatus tendons and a tear of the posterior aspect of the deltoid muscle was provided.

In a May 22, 2007 report, Dr. Facciolo indicated that appellant had a shoulder injury several months earlier and underwent conservative treatment, which included steroid injections. Because of persistent pain and weakness, an MRI scan was obtained, which revealed a massive rotator cuff tear. He provided his examination findings and indicated surgery would be scheduled. A copy of the May 31, 2007 surgical report was submitted.

By decision dated November 17, 2009, the Office denied modification of the May 19, 2009 decision. It found the factual basis of the claim had not been established as the contemporaneous medical records did not establish that appellant sustained an injury as claimed on October 12, 2006.

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees' Compensation Act² 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.³

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.⁴ Second, the employee must submit evidence, in the form of medical evidence, to establish that the employment incident caused a personal injury.⁵ 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.⁶ 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.⁷ 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.⁸ 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.⁹

² 5 U.S.C. §§ 8101-8193.

³ *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁴ *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).

⁵ *Shirley A. Temple*, 48 ECAB 404 (1997).

⁶ See *Betty J. Smith*, 54 ECAB 174 (2002).

⁷ *Id.*

⁸ *Linda S. Christian*, 46 ECAB 598 (1995).

⁹ *Gregory J. Reser*, 57 ECAB 277 (2005).

ANALYSIS

Appellant has not established fact of injury as inconsistencies in the factual and medical evidence cast serious doubt as to whether the specific incident occurred at the time, place and in the manner alleged. He stated on a July 20, 2008 claim form that he injured his right shoulder on October 12, 2006, when he tripped and fell against a cage of mail and jammed his right shoulder while catching himself. Appellant did not file a claim until over one and one-half years after the claimed incident occurred. The record contains no contemporaneous medical reports documenting that appellant received medical treatment for a work-related right shoulder condition which occurred as a result of hitting his right shoulder against a cage of mail on the date alleged.

The inconsistencies in the evidence cast serious doubt upon the validity of the claim. Appellant asserted that he told his supervisor about his right shoulder injury. While his supervisor remembered appellant telling him he had an injury, he did not recall when or how any injury occurred and that appellant did not request a claim form. The record reflects appellant had a previous work-related left shoulder injury. The Board has recognized that an Office hearing representative has discretion to weigh the evidence of record and render credibility determinations based on the witness testimony.¹⁰ The Office hearing representative found there was no way to determine what shoulder injury appellant had mentioned to his supervisor. The hearing representative additionally found that appellant did not offer a credible reason for waiting almost 18 months to file his claim even though he was aware of the procedures for filing a claim with the Office and for reporting an accident with the employing establishment.

The factual history provided in the medical evidence is also insufficient to establish that the October 12, 2006 incident occurred as alleged. While the most contemporaneous medical evidence reflects that appellant sought medical care in November 2006 for right shoulder pain, a few weeks after the claimed injury of October 12, 2006, it provides no mention of any October 12, 2006 employment incident. The November 5, 2006 history intake form from Dr. Schneider's office does not provide any history of injury or discussion pertaining to appellant's right shoulder. The form is incomplete as only the fifth page was submitted. The November 8, 2006 shoulder x-rays noted a history of pain in the right shoulder, but does not provide any history to support a work-related injury occurred as claimed on October 12, 2006. Additionally, the treatment notes from Dr. Schneider's office reflect only that appellant was receiving cortisone shots and prescribed pain medication for a right shoulder condition in November 2006, but fail to provide any history of injury to support the claimed October 12, 2006 injury. The most contemporaneous medical records fail to support a history of injury as alleged to support that the claimed incident occurred on October 12, 2006.¹¹ The Board notes that while Dr. Facciolo's July 3, 2008 and February 16, 2009 reports note a history of injury consistent with appellant's statement he tripped and fell against a hard object, he did not come under Dr. Facciolo's care until May 22, 2007, approximately seven months after the alleged injury of

¹⁰ *Sharon J. McIntosh*, 47 ECAB 754, 757 (1996); *Karen R. Gallagher-Phillips*, Docket No. 03-1392 (issued October 17, 2003).

¹¹ *See S.S.*, 59 ECAB 315 (2008) (the Board has held that contemporaneous evidence is entitled to greater probative value than later evidence).

October 12, 2006. Moreover, Dr. Facciolo's reports and treatment records before July 3, 2008, do not specifically address a work injury occurring on or around October 12, 2006. This diminishes the probative value of his reports in establishing the factual component of appellant's claim.

Therefore, given the insufficiency of the evidence to establish that the October 12, 2006 incident occurred as alleged, the Board finds that appellant has not met his burden of proof to establish his claim.¹²

CONCLUSION

The Board finds that appellant failed to meet his burden of proof to establish that he sustained injuries to his right shoulder on October 12, 2006 as alleged.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated November 17, 2009 is affirmed.

Issued: December 3, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

¹² As appellant did not establish an employment incident alleged to have caused an injury, it is not necessary to consider any medical evidence with regards to causal relationship. *See Bonnie A. Contreras*, 57 ECAB 364 (2006).